

Tulsa Law Review

Volume 22 | Issue 3

Spring 1987

The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate

Linda J. Lacey

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Linda J. Lacey, *The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate*, 22 Tulsa L. J. 281 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol22/iss3/1>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

TULSA LAW JOURNAL

Volume 22

Spring 1987

Number 3

THE LAW OF ARTIFICIAL INSEMINATION AND SURROGATE PARENTHOOD IN OKLAHOMA: ROADBLOCKS TO THE RIGHT TO PROCREATE

Linda J. Lacey*

I. INTRODUCTION

Within the past decade, there has been a dramatic increase in the number of persons who want to become parents, but who either cannot or choose not to rely on the traditional biological process of conception. There are a variety of reasons why these persons have to look for other ways to become parents. Infertility has increased slightly,¹ partially due to the decision of many women to postpone childbearing until their mid-thirties.² Additionally, a significant number of single men and women

* Associate Professor of Law, University of Tulsa College of Law; J.D., University of California at Los Angeles (1978); B.S., University of Wisconsin at Madison (1967). I would like to thank my colleagues, Professors Taunya Banks, Marianne Blair, and Marguerite Chapman, who made many useful suggestions regarding an earlier draft of this article. Janis Peterson was invaluable in the preparation of the manuscript. Finally, particular thanks goes to my Research Assistant, Michael Mulligan, University of Tulsa College of Law, Class of 1988. His diligence, thoroughness, and incisive criticisms contributed significantly to this article.

1. Estimates of the number of infertile couples range from 10 to 20%, e.g., G. GREER, *SEX AND DESTINY* 65 (1984) (10 to 15%); N. KEANE, *THE SURROGATE MOTHER*, 15 (1981) (15 to 20%).

2. See generally, Dullea, *Women Consider Childbearing Over 30*, N.Y. Times, Feb. 25, 1982, at C1, col. 1.; Bernstein, *More Women in 40's Having Babies*, N.Y. Times, Mar. 1, 1981, § 21 (Magazine), at 8, for a discussion of the trend for women to wait until mid-life to become pregnant. Dr. Greer suggests that "[i]nfertility may be said to be a risk that the Western woman agrees to take when she opts for later childbearing; the factors that erode her fertility are all aspects of her chosen

wish to become parents outside of the marriage relationship.³ These prospective parents quickly learn that adoption of a healthy infant⁴ through a state or private agency is either difficult or impossible. Due to the increase in abortions and the decision of many unwed mothers to keep their children,⁵ the number of available babies has declined sharply. Most agencies have long waiting lists or are closed completely to new prospective parents.⁶ Many of the agencies have rules which prohibit single parent adoption⁷ or adoption by a married couple in which one person, usually the woman, exceeds forty years of age.⁸

These childless persons have increasingly turned to alternative methods of conception. The most important include:⁹

lifestyle, although she might well object that no one has even spelled out to her with any clarity what their cumulative effects upon her childbearing potential might eventually be." GREER, *supra*, note 1 at 73.

3. See generally, McCabe, *A New Era of Unwed Moms*, Tulsa World, Sept. 21, 1986, (OK Magazine), at 4-5.

4. A newborn infant of the adopting persons' own race has always been the type of child most in demand. In 1966, nearly 90% of all non-relative adoptions involved a child under one year old. McNAMARA, *THE ADOPTION ADVISOR* 29 (1975). There are a large number of children who are older, handicapped, or of a minority race available for adoption, see notes 97-100 *infra* and accompanying text.

5. E.g., McNAMARA, *supra* note 4, at 25-26; Comment, *Parenthood by Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385, 387 (1982); Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 72 (1982).

6. E.g., McNAMARA, *supra*, note 4 at 25-26. The Tulsa office of the Oklahoma Department of Human Services has issued a "moratorium on processing adoptive applicants for families who want to adopt a normal, healthy Caucasian child under six years of age." Tulsa World, Aug. 19, 1986, at A5.

7. Letter from Oklahoma United Methodist Agency to author (Dec. 6, 1985) [hereinafter United Methodist agency letter]. International adoption is an option for single parents, but even this route is difficult for singles who wish to adopt healthy infants. For example, the Tulsa-based Dillon agency which places Korean children will not accept singles due to a policy of the Korean government. See letter from Dillon Agency to author (1985) [hereinafter Dillon letter].

8. E.g., United Methodist agency letter, *supra*, note 7; Dillon letter, *supra*, note 7. Many agencies also have regulations regarding length of marriage, *id.*, typically two to five years, which provide an additional obstacle for the mid-thirties woman—by the time she has met the marriage requirement, she is "too old" to adopt.

9. A third important means of artificial reproduction is in vitro fertilization (IVF), a process in which a sperm is joined with an egg outside a woman, then transplanted into the womb of the mother or another woman. This procedure is not discussed in detail because it poses legal problems similar to artificial insemination, because it is a high-risk procedure (only one out of every four in vitro fertilizations are successful), because it has not been the subject of significant legislation or case law, because its high cost (\$3000 to \$6000) makes it an undesirable option for many persons, and because to date the number of successful in vitro pregnancies is relatively low (approximately 120 as of 1982, Hollister and Fadiman, *Small Miracles of Life and Science*, Life, Nov. 1982 at 44). For a discussion of legal issues raised by the process, see e.g., Annas & Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199 (1983); Note, *In Vitro Fertilization: Hope for Childless Couples Breeds Legal Exposure for Physicians*, 17 U. RICH. L. REV. 311 (1983); Flannery, Weisman, Lipsett, & Braverman, *Test Tube Babies: Legal Issues Raised by In Vitro Fertilization*, 67 GEO. L.J. 1295 (1979); Comment, *Lawmaking and Science: A Practical Look at In Vitro Fertilization and Embryo Transfer*, 1979 DET. C.L. REV.

(1) Artificial Insemination by Donor (A.I.D.)¹⁰

This is a simple, relatively inexpensive¹¹ medical procedure in which a woman is impregnated by the sperm of a donor who is usually anonymous.¹² It is estimated that between 6,000 and 10,000 A.I.D. children are born every year.¹³

(2) Surrogate Parenting

In its most common form, a woman who has contracted to bear a child is impregnated by artificial insemination with the sperm of a man whose wife is infertile.¹⁴ Once the child is born, the surrogate mother relinquishes all parental rights.¹⁵

Each of these alternatives poses its own set of unique legal problems. Although Oklahoma law provides for artificial insemination of married couples,¹⁶ according to a 1983 Opinion by the Attorney General¹⁷ artificial insemination of single women and surrogate parenting and prohib-

429; Comment, *Artificial Human Reproduction: Legal Problems Presented by the Test Tube Baby*, 28 EMORY L.J. 1045 (1979).

10. There are three types of artificial insemination—artificial insemination by donor, which is discussed throughout this Article, artificial insemination by husband (A.I.H.) in which a married woman receives the sperm of her husband, and combined artificial insemination (C.A.I.) in which a married woman receives a mixture of her husband's and a donor's sperm. Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 468-70 (1983). Because the latter two types of artificial insemination do not pose significant legal problems, they will not be discussed in this Article.

11. If A.I.D. is performed by a doctor, it will cost approximately \$60 to \$200, Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 29 & n.144 (1981); Bagne, *High-Tech Breeding*, MOTHER JONES, Aug. 1983 at 23. Ms. Kritchevsky characterizes the procedure as expensive, Kritchevsky, *supra*, at 29. However, in contrast to the high cost of in vitro fertilization, *see supra* note 9, or adoption which ranges from \$2,000 to \$10,000, it seems reasonable to characterize the procedure as inexpensive. Moreover, if a woman chooses to inseminate herself, which is possible and relatively easy, Kritchevsky, *supra*, at 4, the cost may be even lower.

12. The procedure involves a process in which semen is usually obtained by masturbation and is deposited by a syringe in or near a woman's cervix. McLaren, *Biological Aspects of A.I.D.*, in LAW AND ETHICS OF A.I.D. AND EMBRYO TRANSFER (K. Branden ed. 1973). Semen can be frozen and distributed later by sperm banks, *id.* at 5-6. As early as 1322, artificial insemination was used to breed horses and there is evidence of artificial insemination of humans in the sixteenth century. The first recorded instance of artificial insemination of humans occurred in 1799. Comment, *Artificial Insemination and the Law*, 1982 B.Y.U. L. REV., 935, 937-38 (1982).

13. Curie & Cohen, Luttrell, & Shaprio, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 588 (1979) [hereinafter Curie-Cohen]. This statistic comes from a 1979 study based on questions sent to 711 physicians. Due to the lack of definitive statistics and the secrecy that surrounds artificial insemination in some circumstances, it is impossible to obtain a definitive number. Other estimates have been higher, ranging as high as 20,000 annual births, FINEGOLD, ARTIFICIAL INSEMINATION (2d. ed. 1976).

14. Single men may also engage in a surrogate parenthood contract. In a less common form, the child is conceived through in vitro fertilization, *supra* note 9, and placed in the womb of a woman who is not the child's natural mother. Additionally, a single woman may hire a surrogate mother to bear a child for her, using artificial insemination by an anonymous donor.

15. *See infra* notes 189-191 and accompanying text.

16. OKLA. STAT. tit. 10, §§ 551-53 (1981).

17. 15 Op. Okla. Att'y Gen. 277 (1983) [hereinafter Attorney General Opinion].

ited.¹⁸ The Attorney General's opinion is possibly correct in its assertion that surrogate parenting arrangements are illegal, but the opinion is probably wrong in its statement that artificial insemination is, or could be, prohibited.¹⁹ This conclusion is based, at least in part, on an analysis of the constitutionality of prohibiting artificial insemination of single women and surrogate parenting arrangements.²⁰ At the end of each section of this article is proposed legislation which would resolve the problems created by the current unsettled state of Oklahoma law.²¹

II. ARTIFICIAL INSEMINATION BY DONOR

"I'm not really sure I want to be involved with a man any more. In the meantime, my biological clock is ticking. And the one thing I've known all my life is that I want to have a child."²²

A. The Attorney General's Opinion

In its early days, even artificial insemination of married women with the consent of both husband and wife was often prohibited or considered adultery.²³ Recent decisions reject the concept of A.I.D. as adultery²⁴

18. *Id.*

19. See *infra* notes 27-108 and 115-191 and accompanying text.

20. See *infra* notes 48-108 and 133-155 and accompanying text. There are many other legal issues regarding artificial insemination which this article will not discuss, including the major question of the disclosure of the donor's identity. There is a concern that if a donor's sperm is used for multiple impregnations, unknowing incestuous relationships might result. Generally, the odds of A.I.D. half-siblings marrying are quite small. FINEGOLD, *supra* note 13, estimates such a marriage will occur only once in a hundred years. However, if the donor is a member of a minority ethnic group in a small community, the odds may be higher. See generally, Comment, *The Need for Regulation of Artificial Insemination by Donor*, 22 SAN DIEGO L. REV. 1193, 1210 (1985).

An additional issue is whether a child conceived through artificial insemination has a right to information about her natural father. See Smith, *Artificial Insemination: Disclosure Issues*, 11 COL. HUMAN RIGHTS L. REV. 87 (1979). It has also been suggested that the practice of physicians who perform artificial insemination should be regulated to assure adequate screening of donors. See Recent Development, *The Legal Incubation of Artificial Insemination: A Proposal to Amend the Illinois Parentage Act*, 18 J. MAR. L. REV. 797 (1985); Clapshaw, *Legal Aspects of Artificial Human Reproduction: Can the Law Afford to Play Ostrich?*, 4 AUCKLAND U.L. REV. 254 (1982).

21. See *infra* notes 192-212 and accompanying text.

22. This quote was made by the character, Meg, in the 1984 movie *The Big Chill*.

23. The first reported decision was a Canadian case, *Orford v. Orford*, 58 D.L.R. 251 (Can. 1921), in which the court upheld a husband's divorce suit counterclaim that his wife had committed adultery by obtaining A.I.D. In *Doornbos v. Doornbos*, an Ohio court stated that A.I.D. "with or without the consent of the husband is contrary to public policy and good morals, and constitutes adultery on the part of the mother." 23 U.S.L.W. 2308 (1955) (Super Ct. Cook County, Ill., Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E. 2d 844 (1956). The court also stated that the child would be considered illegitimate. See generally Comment, *supra* note 12, at 938-52 for an extensive discussion of earlier cases regarding A.I.D.

24. *People v. Sorenson*, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968). The California Supreme Court determined that a husband who had consented to his wife's A.I.D. was the child's lawful father and that the act was not adultery. *Id.* at 289, 437 P.2d at 501, 66 Cal. Rptr. at 13. See

and at least twenty-two states,²⁵ including Oklahoma, expressly permit the procedure for married persons and provide for automatic legitimation of the artificially-conceived child. The legal status of unmarried women desiring artificial insemination is less clear. Nevertheless, many single women do utilize the procedure. It is estimated that over 1,500 single women bear an A.I.D.-conceived child every year.²⁶

In 1983, the Oklahoma Attorney General was asked for an official opinion as to whether surrogate gestation was a violation of Oklahoma's Trafficking in Children statutes. His reply not only forbade surrogate motherhood,²⁷ but also in totally unnecessary dicta stated that artificial insemination of unmarried women was prohibited.²⁸ The Attorney Gen-

also Hoch v. Hoch, TIME, Feb. 26, 1945, at 58 (Cir. Ct. Cook County, Ill. 1945) (oral opinion in which the judge held that A.I.D. is not adultery).

25. ALASKA STAT. § 25.20.045 (1983); ARK. STAT. ANN. § 61-141(c)(1971); CAL. CIV. CODE § 7005 (West 1983); CAL. PENAL CODE ANN. § 270 (West Supp. 1987); COLO. REV. STAT. § 19-6-106 (1986); CONN. GEN. STAT. ANN. §§ 45-69(j)-45-69(k) (West 1981); GA. CODE ANN. §§ 74-101.1 (Supp. 1986); KAN. STAT. ANN. §§ 23-128, 23-129 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1987); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MICH. COMP. LAWS ANN. §§ 333.2824(6), 700.111(2) (West 1980); MONT. CODE ANN. § 40-6-106 (1983); NEV. REV. STAT. § 126.061 (1985); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. tit. 10, §§ 551-52 (1981); OR. REV. STAT. § 109.243 (1985); TENN. CODE ANN. § 68-3-306 (1983); TEX. FAM. CODE ANN. § 12.03(a) (Vernon 1986); VA. CODE § 64.1-7.1 (1980); WASH. REV. CODE ANN. § 26.26.050 (1986); WIS. STAT. ANN. § 767.47(9), § 891.40(1) (West 1981 & Supp. 1986); WYO. STAT. § 14-2-103 (1986). Six of these statutes totally or substantively adopt the provisions of the Uniform Parentage Act, which provides:

§ 5 [Artificial Insemination]

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

UNIF. PARENTAGE ACT §§ 5, 9A U.L.A. 592 (1979); see CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1986); MONT. CODE ANN. § 40-6-106 (1983); NEV. REV. STAT. § 126.061 (1985); WASH. REV. CODE ANN. § 26.26.050 (1986); WYO. STAT. § 14-2-103 (1986).

26. Fleming, *New Frontiers in Conception*, N.Y. Times, July 20, 1980, § 6 (Magazine), at 14, col. 1. See generally Donovan, *The Uniform Parentage Age and Non-Marital Motherhood by Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193, 195-200 (1982) for a thorough discussion of this option.

27. Attorney General Opinion, *supra* note 17, at 279-280. See *infra* notes 115-130 and accompanying text for a discussion of this section of the opinion.

28. *Id.* at 279. The dicta was unnecessary because the Attorney General ultimately concluded that even artificial insemination of married women for the purpose of receiving compensation violates the Oklahoma Child Trafficking Act, OKLA. STAT. tit. 21 §§ 865-68 (1981 & Supp. 1986). This determination would obviously apply to unmarried women as well, so there was no need to state that single women were forbidden A.I.D.

eral began with an examination of the statute permitting artificial insemination²⁹ which provides in pertinent part:

§ 551 Authorization: The technique of heterologous artificial insemination may be performed in this state by persons duly authorized to practice medicine at the request and with the consent in writing of the husband and wife desiring the utilization of such technique for the purpose of conceiving a child or children.

§ 552 Status of Child: Any child or children born as the result thereof shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of such technique.

§ 553 Persons Authorized—Consent: No person shall perform the technique of heterologous artificial insemination unless currently licensed to practice medicine in this state, and then only at the request and with the written consent of the husband and wife desiring the utilization of such technique.³⁰

1. The Legislature Intended to Prohibit Artificial Insemination of Unmarried Women

The Attorney General stated that the law *requires* that a woman seeking artificial insemination be married. He argued that because "the statute makes no provision for permitting an unmarried woman to be artificially inseminated, it follows that the legislature intended to prohibit such a possibility. . . . The specific language of 10 O.S. 1981 § 552 demonstrates the intention to protect a child from the stigma of illegitimacy."³¹ Finally, he cites language from the title of the statute as expressing this intent:

An Act relating to children; providing for legitimacy of children born through heterologous artificial insemination; providing that such children shall be considered as natural born children of husband and wife agreeing in writing to such process; providing for filing of such consent in the manner provided for adoptions; providing for privacy; and declaring an emergency.³²

The Attorney General's interpretation of the legislative intent behind the artificial insemination bill appears to be based solely on speculation. The primary sponsor of the bill was George W. Camp, a member of the House of Representatives from Oklahoma City.³³ Mr. Camp has of-

29. OKLA. STAT. tit. 10, §§ 551-553 (1981).

30. *Id.*

31. Attorney Gen. Opinion, *supra* note 17, at 279.

32. *Id.* at 280.

33. Other co-authors of the bill in the House were: Thomas A. Bamberger, D—Oklahoma City; Jerry Sokolsky, D—Oklahoma City; C.H. Spearman, D—Oklahoma City. Finis Smith, D—

ferred the following explanation for his sponsorship of the Bill.

I decided to introduce the Artificial Insemination Bill after reading Volume 19, page 448 of the Oklahoma Law Review which was an article entitled "Parent and Child: Legal Effect of Artificial Insemination." The article pointed out the vast medical problems that were unanswered and were being unanswered by case law. . . . I felt it to be a proper subject for statutory statement and I felt that the children specifically and the parents incidentally deserve the protection that can be afforded them by HB 707. . . . [T]he greatest necessity was to provide protection for the children conceived and being conceived under present medical practices.³⁴

Mr. Camp stated that the legislation passed with little debate and that "the underriding concern of most of these legislators was that this technique is now being employed and the resultant children are without protection. I believe that it was a desire to protect these children that was probably the strongest reason for securing passage of the legislation."³⁵ According to Mr. Camp, neither he nor the legislature contemplated the possibility of single women requesting artificial insemination and did not intend to prohibit the procedure.³⁶ Therefore, the Attorney General's interpretation of the bill is erroneous.³⁷

2. The Wording of the Statute Prohibits Artificial Insemination of Unmarried Women

The opinion also relied on the *wording* of the statute to support its conclusion that the artificial insemination of single women is prohibited. This conclusion is also open to question. Sections 551 and 552 of the Oklahoma statute closely resemble other state statutes which expressly permit A.I.D. of married persons and state that the child will be consid-

Tulsa, was the principle Senate author. However, it is clear from Mr. Camp's statements that the other legislators did not share his degree of responsibility for the bill.

34. Letter from George W. Camp to Michael Mulligan (October 28, 1986) [hereinafter Camp letter]. The law review article Mr. Camp mentions does not address the problem of single women and artificial insemination. Mr. Camp also states he had personal knowledge of the problems of artificial insemination because as a country attorney in 1951, "I had the duties of prosecution of bastardy cases and did some research into the laboratory methods of proof available for proving or disproving paternity through blood types and factors I felt compassion for the parties involved when the courts were not consistent in their rulings over the years."

35. *Id.*

36. *Id.*

37. While in many states such an Attorney General's opinion is merely advisory, in Oklahoma it has been held such an opinion is binding upon the state official affected by it. *State ex rel. York v. Turpen*, 681 P.2d 763 (Okla. 1984). It is the duty of state officials to follow and not disregard those opinions. *Rasure v. Sparks*, 75 Okla. 181, 183 P. 495 (1919). This duty continues until a judgment of a court of competent jurisdiction relieves the public official of the burden of compliance. *Pan Am. Petroleum v. Board of Tax-Roll Corrections*, 510 P.2d 680 (Okla. 1973).

ered the legitimate child of the non-donor husband.³⁸ Only Oregon expressly permits A.I.D. of single women,³⁹ but four other states have omitted the word "married" from their adoption of the Uniform Parentage Act provisions regarding artificial insemination.⁴⁰ The legal status of unmarried women wishing artificial insemination in the states with statutes referring only to married women is uncertain. The few reported cases regarding A.I.D. of single women involve issues of the child's parentage,⁴¹ not of the permissibility of the procedure itself. In the only known constitutional challenge to a possible restriction of A.I.D. for single women, the Michigan A.C.L.U. filed a complaint on behalf of a single woman who was refused A.I.D., but the case was settled when the clinic accepted the woman's application.⁴²

One of the few commentators to address this subject argues that the statutes cannot be read as making A.I.D. of single women illegal.⁴³ She relies primarily on the fact that no state statute, including that of Oklahoma, *expressly* forbids A.I.D. of unmarried women. It is a funda-

38. See *supra* note 25.

39. OR. REV. STAT. § 677,365 (1985). The statute requires the woman's consent to A.I.D. and that of her husband if she is married. See Note, *Artificial Insemination and Surrogate Motherhood--A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L. REV. 913, 926-32 (1981) for a discussion of the Oregon statute.

40. UNIF. PARENTAGE ACT § 5(b), 9A U.L.A. 593 (1979); see CAL. CIV. CODE ANN. § 7005(b) (West 1985); COLO. REV. STAT. § 19-6-106 (1986); WASH. REV. CODE ANN. § 26.26.050 (West 1986); WYO. STAT. § 14-2-103 (1986). The California Court of Appeals has interpreted the California statute as permitting A.I.D. of single women. In *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986), the court held that the donor of sperm to a single woman could be determined to be the child's father. In dicta, the opinion focused on the omission of the reference to married women in the California law, in contrast to the U.P.A., and stated: "Thus the California Legislature has afforded unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity . . ." *Id.* at 392, 224 Cal. Rptr. at 534.

41. The first recorded case dealing with A.I.D. of single women was *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977). The male donor of sperm to an unmarried woman brought an action for visitation of the child and the court determined he was the child's natural father, stating that "if an unmarried woman conceives a child through artificial insemination from semen from a known man, that man cannot be considered to be less a father because he is not married to the woman." *Id.* at ___, 377 A.2d at 824. Similarly, in *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986), the California Court of Appeals upheld a trial court's determination that the donor of sperm to an unmarried woman was the child's father. It should be noted that in the California case, the court stated that if the woman had followed the statutory provision for A.I.D. by a licensed physician, the donor would not have been declared the father.

42. *Sned v. Wayne State Univ.* No. 80-725-83 (E.D. Mich. filed July 15, 1980). See Kern & Ridolfi, *The Fourteenth Amendment's Protection of a Woman's Right to be a Single Parent through Artificial Insemination by Donor*, 7 WOMEN'S RTS. L. RPTER. 251, 254, n. 22 for a description of the plaintiff's brief in the case.

43. Kritchevsky, *supra* note 11, at 19-23. Other commentators have characterized the state laws as "uncertain," Donovan, *supra* note 26, at 217, or "far from clear," Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 671 (1985).

mental principle of criminal law that actions must be declared illegal to be punished. Therefore, in the absence of specific language making A.I.D. of single women illegal, the practice must be presumed to be legal.⁴⁴ This is a strong argument when applied to most state statutes, but the Oklahoma statute presents an additional problem, due to its specification that “[n]o person shall perform the technique [of A.I.D.] unless currently licensed to practice medicine in this state, and then *only* at the request and with the written consent of the husband and wife desiring the utilization of such technique.”⁴⁵ At least one commentator has read this provision to “arguably prohibit A.I.D. for single women.”⁴⁶ The statute’s language certainly appears to permit A.I.D. in only one situation—where there is a consenting husband and wife. On the other hand, it is possible to construe the statute more narrowly as merely prohibiting A.I.D. performed by someone other than a doctor and in situations where the husband’s consent is not given. This narrow reading is more congruent with the legislative intent of the statute—to provide for the protection of children born to married couples when the husband is not the father. Moreover, the lack of penalty for noncompliance with the statute further supports the argument that the statute is, at best, a limited one.

In summary, the clear lack of legislative intent to prohibit single women from obtaining A.I.D., the ambiguous nature of the statute, and the criminal law principle that actions not expressly forbidden are presumed to be legal, all support the proposition that the Attorney General’s opinion is incorrect. Artificial insemination of single women is not prohibited in Oklahoma.

B. *Procreation by Artificial Insemination as a Fundamental Right*

Although the best interpretation of the Oklahoma statute does not prohibit A.I.D. for single women, it is possible that a court might decide otherwise. Moreover, the Attorney General’s opinion will remain in ef-

44. Kritchevsky, *supra* note 11 at 14. Additionally, Ms. Kritchevsky argues that no state forbids adoption by single persons, *id.* at 19-20, and refutes arguments that A.I.D. should be considered illegal in states where the child would be illegitimate and that bearing a child by A.I.D. is fornication. *Id.* at 21-22.

45. OKLA. STAT. tit. 10, § 553 (Supp. 1985) (emphasis added).

46. Donovan, *supra* note 26, at 218-19. Two other statutes also contain restrictive language—CONN. GEN. STAT. ANN. § 45-69(g)(b) (West 1981): “A.I.D. shall not be performed unless the physician receives in writing the request and consent of the husband and wife desiring the utilization of A.I.D. . . .”; KAN. STAT. ANN. § 23-128 (1981): “The technique of heterologous artificial insemination may be performed in this state at the request and with the consent in writing of the husband and wife. . . .”

fect until challenged, thus providing at the very least a chilling effect on doctors who may wish to perform the procedure for single women.⁴⁷ Therefore, it is necessary to examine whether a prohibition of A.I.D. for single women would survive a constitutional challenge.

Several law review articles have argued that such a prohibition would constitute a fourteenth amendment violation of due process and/or equal protection.⁴⁸ The basic argument is premised on the proposition that procreation by artificial insemination is one of the fundamental rights included in the right of privacy.⁴⁹ A long line of cases supports this proposition. In *Skinner v. Oklahoma*,⁵⁰ the Supreme Court recog-

47. A 1979 study showed that only 10% of all doctors who perform artificial insemination will perform the procedure on single women, Curie-Cohen, *supra* note 13, at 585. It is very likely this number is higher in Oklahoma due to the Attorney General's opinion which would make the doctor believe that it is against the law to perform the procedure. Most Oklahoma doctors do consult attorneys prior to performing the procedure and both donors are required to sign a consent form excluding the doctor from any liability. The following provisions of a form prepared by a Tulsa attorney are typical:

We certify that we were married approximately ___ years ago, and have at all times since lived together as Husband and Wife; we have been informed and understand the nature of the procedure and the technique of Artificial Insemination, that pregnancy may ensue, and that complications may result from or during pregnancy, childbirth, or delivery which cannot be fully anticipated; that there is always a risk, as in the case in any pregnancy, that the child or children may be born with a birth defect or abnormality; that the technique may require several attempts, and that there is no certainty that pregnancy or a full-term pregnancy will result; that the identity of the Donor will be confidential, unknown to us, and his medical records will not be retained; that our identity will be kept confidential and unknown to the Donor.

We hereby release [doctor's name], M.D. from any liability for any complications which may result from the performance of said technique, from the resultant pregnancy, childbirth or delivery, from the birth of a child with birth defects or abnormal in any respect, and from any other consequence which may result from said Artificial Insemination, being fully cognizant that all such risks and complications are not and cannot be fully anticipated and are as fully present in the case of a pregnancy resulting from sexual intercourse between Husband and Wife as by this procedure.

We recognize, understand and hereby Consent that the child or children born as a result of this technique are in fact and in law and in all respects the same as a naturally conceived child or children of ours. We agree that we will love, nurture, care for, educate and maintain the child the same as a naturally conceived child of ours, and that the relationship of parent and child, and all the rights, duties and other legal consequences of said relationship exist between us and said child.

48. Kritchevsky, *supra* note 11, at 26-40; Note, *supra* note 43, at 674-84; Donovan, *supra* note 26; Kern & Ridolfi, *supra* note 42, at 258-83; Note, *supra* note 39, at 934-35; Levine, *My Body, My Life, My Baby, My Rights*, 12 HUM. RTS. 27 (1984).

49. The right of privacy was first recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965). According to Justice Douglas' opinion, it is to be found in the "penumbras" of various provisions of the Bill of Rights. *Id.* at 483-85. For an argument that this right extends to an unmarried person's choice of lifestyle and sexual conduct, see Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

50. 316 U.S. 535 (1942). In *Buck v. Bell*, 274 U.S. 200 (1927), the Court upheld sterilization of mentally retarded persons without their consent, with the infamous quote "three generations of imbeciles are enough." *Id.* at 207. Most commentators believe the case would be overruled if presented to today's Court. See Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 1011, 1023 (1977).

nized that procreation was a basic human right, and struck down a law permitting sterilization of persons convicted of two felonies involving moral turpitude. In *Griswold v. Connecticut*⁵¹ and *Eisenstadt v. Baird*,⁵² the Court struck laws forbidding the use and sale of contraceptives, again emphasizing that decisions regarding childbearing were protected by the right of privacy. Significantly, in *Eisenstadt*, the Court stated that "[i]f the right of privacy means anything, it is the right of an *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁵³ In *Roe v. Wade*,⁵⁴ the Court extended this right to protect the decision of a woman to terminate a pregnancy without interference by the state.

All of these cases recognize that procreation is a fundamental need for many women and allow women *choices* regarding procreational matters, therefore they surely must include the choice of a woman to procreate by A.I.D. As Professor Robertson states: "Full procreative freedom would include both the freedom *not* to reproduce and the freedom *to* reproduce when, with whom, and by what means one chooses."⁵⁵ Until recently, this argument appeared virtually unassailable.⁵⁶ However, the recent Supreme Court case, *Bowers v. Hardwick*,⁵⁷ which upheld laws forbidding homosexual sodomy acts, suggests that a decision protecting A.I.D. as a fundamental right is by no means a certainty. The Eleventh Circuit Court of Appeals had determined that the Georgia sodomy law violated the fundamental rights of privacy established in *Griswold*, *Eisenstadt*, and *Roe*. Justice White's majority opinion rejected this conclusion, stating emphatically that "any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is

51. 381 U.S. 479 (1965).

52. 405 U.S. 438 (1972) (plurality opinion).

53. *Id.* at 453 (emphasis in original).

54. 410 U.S. 113 (1973). For a critique of this opinion, see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

55. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 406 (1983).

56. The majority of the law review articles this author has found which discuss the subject argue that denial of A.I.D. to single women is unconstitutional, *see* note 48 *supra*. No law review article takes a contrary position. However, Professor Robertson warns that, "[B]ecause recognition of a right of single persons to conceive children would be seen as another foray into the thickets of substantive due process, one should not be surprised to find the Court reluctant to imply for single persons the same right to procreate as for married persons." Robertson, *supra* note 55, at 418-20.

57. 106 S. Ct. 2841 (1986).

unsupportable."⁵⁸

On its face, there is nothing in *Bowers* which repudiates the proposition that the decision to procreate by the means of A.I.D. is a fundamental right. The thrusts of Justice White's majority opinion,⁵⁹ and Justice Burger's concurrence,⁶⁰ are based on the fact that there is substantial historical precedent for laws forbidding sodomy. Moreover, Justice White explicitly noted that "[n]o connection between family, marriage, or procreation" and homosexual activity was demonstrated.⁶¹ This historical argument cannot be used to validate laws forbidding artificial insemination of single women because the connection between such laws and decisions regarding family, marriage, and procreation is undisputable. Nevertheless, there are ominous undercurrents in the opinion which create doubt as to a decision upholding a right of access to artificial insemination. Justice White gives us a strong signal that he believes the Court has gone too far in its fundamental rights analysis:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights inbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.⁶²

Certainly the framers of the Constitution did not contemplate the possibility of artificial insemination as a means of procreation. Therefore, *if* the right to receive artificial insemination is characterized as a new right, separate from and going far beyond the established right to procreate through natural means, it may not attain fundamental right status.

This argument should ultimately fail because it is based on an overly narrow view of the right to procreate. The dictionary defines procreation as "to produce (young)," "begat (offspring)."⁶³ Artificial insemination clearly is included in this definition. The fact that A.I.D. is a relatively new medical technique not considered by the framers is hardly conclu-

58. *Id.* at 2844.

59. *Id.* at 2842, stating that sodomy was a common law criminal offense and prohibited by the laws of the thirteen states at the time of the ratification of the Bill of Rights. *Id.* at 2844.

60. *Id.* at 2847 (Burger, C.J., concurring). Burger explained that "proscriptions against sodomy have very 'ancient roots.' Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of these practices is firmly rooted in Judaeo-Christian moral and ethical standards."

61. *Id.* at 2844.

62. *Id.* at 2846.

63. WEBSTER'S NEW WORLD DICTIONARY 1133 (2nd College ed. 1970).

sive. Television did not exist when the Bill of Rights was drafted, yet no one would seriously argue that the first amendment does not protect televised speech.⁶⁴

The Court has consistently recognized the deep significance of childbearing to a woman's life. A regulation which attempted to control overpopulation by limiting the number of children a woman could bear would be met with horror and almost certainly struck. The Court is aware that "[m]arriage and procreation are fundamental to the very existence and survival of the race."⁶⁵ In speaking of sterilization, the Court stated that "[t]here is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."⁶⁶ It is hard to imagine an action by the state that cuts deeper into fundamental human liberty than the deprivation of the right to choose to bear a child. To limit this right to "natural means," and thus to deprive a single woman of the only realistic method of conception that may be open to her,⁶⁷ makes a mockery of this choice.

If the right to procreate through artificial insemination is a fundamental right, the state's reasons for denying this right to single women must be compelling or else the prohibition will be a denial of equal protection.⁶⁸ The next section of this Article will examine the possible argu-

64. The Court has concluded that the first amendment permits greater regulation of the broadcast media than the print media, e.g., *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). However, this conclusion is based on the fact that airwaves are scarce and that television is a uniquely intrusive media, rather than an argument that protection of televised speech is outside of the framers' intent.

65. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

66. *Id.*

67. For a rejection of the theory that a single woman has other "alternatives" besides A.I.D., see *infra* notes 93-96 and accompanying text.

68. Both single women and married women have a right to procreate. The Oklahoma statute clearly denies artificial insemination by donor to a married woman who wishes to obtain the procedure without her husband's consent. Arguably, this denial is a violation of her right to procreate. There are two basic situations in which a woman might wish A.I.D. without consent:

- (1) She suspects her husband is infertile. She plans to obtain A.I.D. without his knowledge and expects him to assume the child is his.
- (2) She decides her desire for a child outweighs the risk to her marriage that will be created by a decision to obtain A.I.D. against her husband's will. She may hope that once the child becomes a reality, her husband will accept her decision.

If the married woman possesses a right to procreate, the state must provide a compelling reason for its denial of that right. The state's major argument may be that A.I.D. without a husband's permission is similar to adultery, which may be constitutionally prohibited. See Justice White's majority opinion in *Bower v. Hardwick*, 106 S. Ct. 2841 (1986), which states that if the courts prohibited sodomy prosecution, it would nonetheless "leav[e] exposed to prosecution adultery, incest and other sexual crimes . . . We are unwilling to start down that road." *Id.* at 2846. Technically, artificial insemination is not sexual intercourse, which is generally part of the definition of adultery. However, if the purpose of adultery laws is seen as prevention of a woman from becoming pregnant

ments that a state could make to prove a compelling interest.

C. *State Interests in Prohibiting A.I.D. of Single Women*

1. The State has an Interest in Preventing Illegitimacy.

The Attorney General's Opinion assumed that the Oklahoma legislature would desire to avoid the birth of illegitimate children.⁶⁹ The State could argue that it wants to prevent the child from the stigma of being born outside of wedlock, of being called a bastard, and that a ban on A.I.D. for single women is necessary to prevent an excessive number of illegitimate children. This argument was rejected by the Supreme Court in *Zablocki v. Redhail*.⁷⁰ "The woman . . . had a fundamental right to seek an abortion . . . or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings."⁷¹ Additionally, there is a definite trend in most states, particularly those which have adopted the Uniform Parentage Act, to eliminate discrimination against children born out of wedlock and to remove the label of "illegitimate" for such children.⁷² Oklahoma has expressly abolished the terms "illegitimate" and "bastard" in reference to children

with another man's child, then prohibition of A.I.D. serves the same purpose. On the other hand, modern courts have expressly stated that A.I.D. is not adultery, *see supra* note 24.

The state may also justify the statute as an attempt to preserve the nuclear family. Inasmuch as the state does not enjoy a right to prevent marital deceit, the argument will probably fail.

Finally, the Court's decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), might prove fatal to any state's interest in prohibiting a woman to choose A.I.D. without her husband's consent. The Court struck a law allowing a husband to prevent his wife's decision to obtain an abortion, stating that, "[t]he obvious fact is that when the wife and husband disagree on this decision, the view of only one of the two marriage partners can prevail," and that ". . . it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all." *Id.* at 71. It can be argued that the husband has a greater interest in preventing the birth of a child because the child's existence will mean a continuing responsibility of child support. In fact, it could even be argued that permitting A.I.D. without the husband's consent would be "forcing" him to have an unwanted child, and that he enjoys the same right to prevent that result as a woman has to obtain an abortion. However, because his nonconsent to the procedure can be viewed as negating the presumption that he is the child's father, he might not be forced to support the A.I.D.-conceived child in the event of a divorce.

As the discussion has indicated, the question as to whether Oklahoma's decision to forbid married women access to A.I.D. without their husbands' consent violates due process is unresolved and should be the subject of future law review articles. This article will not attempt to definitively resolve this difficult issue.

69. Attorney General Opinion, *supra* note 17, at 279-80.

70. 434 U.S. 374 (1978).

71. *Id.* at 386.

72. *See generally* KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971). *See* Donovan, *supra* note 26, at 200-04 for a discussion of Supreme Court cases regarding legitimacy and a conclusion that the Court has made "clear progress away from the debased status of nonmarital children under the common law." *Id.* at 204.

born of an unwed mother, and has provided that all children born within the state of Oklahoma should be presumed legitimate.⁷³ This is a strong indication that the state intends to remove any stigma attached to these children. This action undercuts the possible argument that the state has a compelling interest in preventing out-of-wedlock births. Moreover, the fact that an increasing number of unwed mothers choose to keep their children is evidence of a change in societal attitudes toward children born of single mothers.⁷⁴

The statute is also underinclusive. Most illegitimate children are conceived through natural means which are legal in states which have abolished the crime of fornication. Because the state cannot regulate most out-of-wedlock births, there is no reason to allow it to prevent only A.I.D. single parent births.⁷⁵

2. It is in a Child's "Best Interest" to be a Member of a Two-Parent Family.

This argument is actually a variation of the illegitimacy prevention rationale. It rests on the common presumption that the traditional nuclear two-parent family is the best environment for a child.⁷⁶ This interest has been upheld in decisions permitting adoption agencies to give married couples preferences.⁷⁷

The argument encounters an initial stumbling block. The "best interests" of the child standard applies to existing children—not to fetuses which are not considered persons under the law.⁷⁸ While a court or an adoption agency could validly choose a married couple over a single person as the best parents for an existing child wanted by both parties, it is a very different matter to prevent the conception of a child in a situation in which only its mother will have parental rights.

The high divorce rate additionally undercuts any argument that the state can efficiently promulgate regulations to insure that children are placed in two-parent families. Today, over 25% of all children are raised

73. OKLA. STAT. tit. 10, § 1.1 (1981).

74. See generally Rivlin, *Choosing to Have a Baby on Your Own*, MS., Apr. 1979, at 68.

75. Of course this argument cuts both ways: a state would argue that the very fact that it cannot regulate all out-of-wedlock births is all the more reason why it should prevent the births it *can* control. This argument would probably not withstand an equal protection challenge.

76. See Donovan, *supra* note 26 at 235-36 and Note, *supra* note 43, at 683-84, for additional discussion and repudiation of this presumption.

77. See J. GOLDSTEIN, A. FREUND & A. SOLNIK, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

78. *Roe v. Wade*, 410 U.S. 113 (1973).

in single-parent families.⁷⁹ Even those commentators who deplore this trend do not seriously suggest that divorce should be completely outlawed. It would be outrageous to suggest that only consenting married couples who can prove that they will not divorce should be granted access to A.I.D. But because approximately one out of every two married couples seeking the technique will divorce,⁸⁰ the ultimate result will be the same as the result when a single woman is inseminated—a child raised in a one-parent family.

Finally, the presumption that children fare best in two-parent families is at least open to question. One commentator states that this assumption “apparently derives more from social bias than well-grounded psychological theory.”⁸¹ A more viable presumption would be that wanted children will receive a better upbringing than unwanted children. Every child conceived by A.I.D. is a wanted child. The mother has made a conscious choice to conceive. The state should recognize that these children, even if born to single parents, may have a much better chance at happiness than “accidental” children born through the traditional method.

3. The State has an Interest in Protecting Morality and Preserving the Family.

It is well-established that a state may pass some regulations which attempt to preserve the nuclear family structure and traditional moral values.⁸² The principle was reconfirmed in *Bowers v. Hardwick*,⁸³ particularly by the highly moral tone of Justice Burger’s concurrence which describes homosexuality as an “infamous crime against nature” and “condemned by Judaeo-Christian moral and ethical standards.”⁸⁴ A state could argue that A.I.D. is “unnatural” and “immoral” and that permitting the procedure outside of marriage will remove the incentive for single women to marry.

As to the first argument, there is a long history of general societal disapproval of homosexuality,⁸⁵ fornication,⁸⁶ and adultery,⁸⁷ practices which are also frowned upon by most religions. There is no similar his-

79. Will, *Demos Turn to Faulty Policies*, Tulsa World, Oct. 2, 1986, at A12, Col. 2.

80. Report of the Ethics Committee of the American Fertility Society, *Ethical Considerations of The New Reproductive Technologies* 185 (Sept. 1986) [hereinafter Fertility Society Report].

81. Note, *supra* note 43 at 683 n.80 (citing psychologists who have disputed this theory.)

82. E.g., *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973).

83. 106 S. Ct. 2841 (1986).

84. *Id.* at 2847.

85. *Id.*

tory of condemnation of artificial insemination. Although a few religions prohibit the practice,⁸⁸ most are at least silent on the subject. The author of Oklahoma's artificial insemination bill,⁸⁹ George W. Camp, considered the possibility of religious disapproval of his bill and reported:

I first conferred with my Methodist minister and requested that he confer with his colleagues. To my surprise he was quite familiar with the problem and recognized it as one which needed clarification and it was not in conflict with any of his preceptives. I next checked with a Baptist minister who happened to be House Chaplain for that week and he saw no problems. I next checked with a Catholic priest . . . and he thought it was good legislation.⁹⁰

Due to the lack of widespread disapproval of A.I.D., any attempt to characterize the Oklahoma Statute as preserving moral values by forbidding A.I.D. to single women should fail.⁹¹

The second argument is rather absurd or at best seriously overinclusive. It is highly unlikely that making single parenthood difficult or impossible will result in a significant number of single women actually marrying, particularly in light of the much-discussed " 'shortage' of marriageable males for older women."⁹²

4. The Unmarried Woman has Other Alternatives.

Because Oklahoma does not prohibit sexual relations for a consenting unmarried woman, it can argue that its prohibition of A.I.D. does not significantly interfere with a woman's right to conceive, because she has the alternative of engaging in "natural" sex with a male for that purpose. This argument has several major flaws.

86. See generally *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972).

87. *Bowers*, 106 S. Ct. at 2846.

88. Levine, *supra* note 48 at 27, states that artificial insemination is prohibited by the Roman Catholic church, "because it is thought to involve masturbation and adultery" and by Orthodox Jews. On the other hand, many liberal Jews believe the practice does not violate Jewish law. For a thorough discussion of the various Jewish viewpoints, see Shapiro, *New Innovations in Conception and Their Effects Upon Our Law and Morality*, 31 N.Y.L. SCH. L. REV. 37 (1986).

89. OKLA. STAT. tit. 10, § 551-53 (1984).

90. See Camp letter, *supra* note 34. It is worth noting that the ministers Camp consulted were addressing A.I.D. of married persons and it is likely that they might not express similar approval of A.I.D. of single persons. However, the comments do illustrate that there is no uniform religious objection to the practice per se.

91. For other arguments supporting this conclusion, see Kritchevsky, *supra* note 11, at 37-39; Note, *Reproductive Technology*, *supra* note 43, at 681-82; Donovan, *supra* note 26, at 241-42.

92. A study by Yale and Harvard social scientists predicted that of white, college-educated women, unwed at age 30, only 20% would marry and of women over 35, only 5%, *The Marriage Crunch*, NEWSWEEK, June 2, 1986, at 52. A recent study predicts that 66% of the 30-year-old women will marry and 41% of the 35 year olds. *Second Opinion*, NEWSWEEK, Oct. 13, 1986, at 10, col. 4.

First, if the woman chooses a man with whom she has had a previous or ongoing relationship to be her child's father, she takes the risk of emotional strain. Even if her relationship with the male friend had previously been platonic, the intimacy of the sexual relationship and the fact that she will now think of the man as the child's father will almost certainly complicate the relationship with considerable costs to both parties. If the woman wants to raise the child herself without interference from the father, she takes a much greater risk of the father asserting rights to the child if he is aware of her pregnancy.⁹³

Second, if the woman either by choice or lack of alternatives chooses to conceive by a series of "one-night" stands in which she engages in sex with a total or relative stranger whom she does not intend to inform of his role in fathering a child, she runs a different set of risks. The likelihood of contracting a sexual disease in such an encounter is great.⁹⁴ Additionally, because she can not realistically ask the prospective father to supply information about his genetic background, she does not have the reassurance of a screening of the donor who supplies the sperm.

Third, for many women, the idea of sex outside of an intimate relationship, or even outside of marriage, may violate strong moral or religious principles.⁹⁵ To a lesbian, the idea of sex with any man, friend or stranger, may be abhorrent. If she is involved in a permanent relationship, her activities may subject the relationship to severe strain.

Most important of all, if the right of an unmarried woman to procreate exists, it should encompass a right to *choose* a method of conception. The state could have argued in *Griswold v. Connecticut*⁹⁶ that it wasn't prohibiting all forms of contraception, because a couple would always have the alternative of the "rhythm method" or the "coitus interruptus" method. Such an argument would have failed. To require an individual to prove the nonexistence of viable alternatives to the exercise of a constitutional right turns the rights theory on its head. It is the responsibility

93. See generally Donovan, *supra* note 26, at 214. "A woman contemplating raising her child in a nontraditional family therefore cannot, when she decides to have a child, ensure that the biological father will not at some point change his mind and choose to assert his court-determined rights. At worst, she risks paternal intrusion into her family; at best she faces the constant threat of such intrusion." *Id.*

94. See generally Banks, *Tort Liability for Transmittal of Sexually-Transmitted Diseases* (unpublished manuscript).

95. This was the situation in the strange case of *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977). A woman wanted a child, but did not want to have intercourse outside of marriage and requested that a friend she was dating donate his sperm.

96. 381 U.S. 479 (1965).

of the state which seeks to restrict liberty to prove the lack of alternatives to its action, not the individual.

5. The Prohibition is Necessary to Prevent Lesbian Motherhood.

Even if the purpose of precluding lesbians from becoming mothers can withstand constitutional scrutiny, any statute forbidding A.I.D. to unmarried women is hopelessly overbroad. The majority of unmarried women seeking A.I.D. are not lesbians.⁹⁷

It is not inconceivable that a future legislature may pass a statute prohibiting only homosexual women from obtaining A.I.D. Could such a statute withstand constitutional muster? *Bowers v. Hardwick*⁹⁸ seems to establish that a double standard for heterosexuals and homosexuals is permissible.⁹⁹ However, this type of statute goes even further than the Georgia criminal statute—in essence it would punish women for the status of being lesbian by creating a presumption that lesbians are unfit mothers by definition.¹⁰⁰ This rationale is overbroad; many courts have recognized that lesbians do make fit mothers and award custody accordingly.¹⁰¹

6. Prohibition of A.I.D. Encourages Prospective Parents to Adopt Unwanted Children.

The shortage of children discussed throughout this article is a shortage of healthy white infants. Most states have black or multiracial infants, older children, sibling groups, and children with “special needs”—either physical or emotional problems, available for immediate adoption,¹⁰² and there is no question that these children are desperately

97. See generally Kritchevsky, *supra* note 11. It is true that two of the few reported cases regarding A.I.D. for single women involve lesbian couples, *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986); *In re A.D.*, 129 Misc. 2d 550; 493 N.Y.S.2d 404 (N.Y. Sup. Ct. 1985). However, this may be due to the fact that lesbian mothers are particularly vulnerable to attempts by the child's natural father to obtain paternity rights, as was the case in *Jhordan C. v. Mary K.*, or must go to court to establish the parenthood of another woman, as was the case in *In Re A.D.* In neither case was the lesbian declared an unfit mother or forced to give up custody of her child.

98. 106 S. Ct. 2841 (1986).

99. The Supreme Court recently denied certiorari to an Oklahoma decision that a sodomy statute applied to a heterosexual man was unconstitutional, which in light of *Bowers v. Hardwick* supports the concept that states may discriminate between homosexuals and heterosexuals. *Post v. State*, 715 P.2d 1105 (Okla. Crim. App.), *cert. denied*, 107 S. Ct. 240 (1986).

100. Kritchevsky, *supra* note 11, discusses this issue at length at 32-36.

101. See Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691 (1976).

102. See McNAMARA, *supra* note 4, at 26.

in need of a home. Many agencies allow single persons and "over-age" couples to adopt these children. A plausible argument can be made that if prospective parents cannot conceive their own child through A.I.D. or surrogate parenting, they will adopt these "waiting children" instead. Such an argument should fail a constitutional ends/means test. There is no real evidence that such a result would happen. Prior to A.I.D. and surrogate parenting, many infertile persons chose to remain childless, even at times when healthy infants were available.

Moreover, it is not necessarily in the child's interest to be adopted by a reluctant parent. "Special needs" children require special attention and love which can only be given by a parent who freely chooses to adopt such a child.¹⁰³ With respect to children of minority races, interracial adoption may not always be the best alternative. Many black leaders are concerned about the negative cultural effects of interracial adoption.¹⁰⁴ American Indians have gone even farther and lobbied for the Indian Child Welfare Act,¹⁰⁵ a comprehensive set of regulations which makes adoption of an Indian child by a non-Indian virtually impossible.

There are other alternatives that a state may employ to encourage adoption of "waiting children." Increased tax benefits and free day-care and health care for parents adopting these children may be a more effective means of insuring that the children are placed in homes where they are genuinely wanted.

7. The State has an Interest in Discouraging the Birth of Children who will Need Public Assistance.

This argument rests on a presumption that mothers of children born out-of-wedlock are more likely to go on welfare than married mothers. While this presumption may be true with respect to "accidental" unwed mothers, it is highly unlikely to be valid with respect to women who use

103. Social workers and other commentators on adoption agree with the statement that "[c]hildren should be wanted because of their worth as human beings, not because they happen to be the most convenient alternative to a first choice." *Id.* at 33-34.

104. In 1972, The National Association of Black Social Workers issued a statement condemning interracial adoption, arguing that "[b]lack children belong physically, psychologically, and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. . . . Black children in white homes are cut off from the healthy self-development of themselves as Black people." *Id.* at 37. *But see* O'Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485 (1986) (contending that placing children according to racial classification may not be in the child's best interest).

105. 25 U.S.C. §§ 1901-23 (1982). For a description of the widespread abuses of Indian family structure which precipitated this Act, see UNGER, *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* (1977); Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. — (1987).

artificial insemination as a method of conception. Such women tend to be highly educated and middle class. The very fact that they can afford to pay for the insemination procedure suggests that they are unlikely candidates for the welfare rolls.¹⁰⁶

Futhermore, even if the presumption *is* true, it is not a valid reason to restrict the right to procreate.¹⁰⁷ If the state cannot attempt to deny welfare benefits to recent residents,¹⁰⁸ it certainly cannot use a desire to reduce welfare payments to restrict a right even more fundamental than the right to travel.

D. *Proposed Legislation*

None of the state's interests in prohibiting A.I.D. of single women are sufficiently compelling to deny the right to procreate.¹⁰⁹ Therefore, the Attorney General's interpretation of the Oklahoma statute is unconstitutional. In order to avoid costly litigation of this issue, the legislature should pass the following amendment to the Artificial Insemination Act:¹¹⁰

§ 554 Scope of the Act: Nothing in this statute is intended to prohibit the technique of heterologous artificial insemination from being performed upon an unmarried woman. The child born of the unmarried woman shall be legitimate, in accordance with title 10, section 1.¹¹¹

III. SURROGATE PARENTHOOD AGREEMENTS

Now Sa'rai Abram's wife bore him no children;
and she had an handmaiden, an Egyptian, whose
name was Hagar. And Sa'rai said to Abram,
Behold now, the Lord hath restrained me from
bearing: I pray thee go unto my maid; it may
be that I may obtain children by her. And

106. Kritchevsky, *supra* note 11, at 28-29. If a woman uses the procedure of self-insemination, she may not have to pay such high costs, so it is possible that a few relatively poor women will use the procedure. However, the few cases dealing with self-insemination indicate that the women chose the procedure for non-financial reasons, *see* Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986) (in which a lesbian mother apparently used the procedure to avoid being refused by a doctor).

107. *See* Kritchevsky, *supra* note 11, at 30, for a similar argument regarding the welfare-roll rationale.

108. *Shapiro v. Thompson*, 394 U.S. 618 (1969). The Court recognized that the state had an interest in protecting its public assistance programs, but stated that it "may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Id.* at 633.

109. *See supra* notes 47-68 and accompanying text.

110. OKLA. STAT. tit. 10, § 551-53 (1981).

111. OKLA. STAT. tit. 10, § 1.2 (1981).

Abram hearkened to the voice of Sa'rai.¹¹²

A. *The Attorney General's Opinion*

Although surrogate motherhood can be traced to Biblical times, it has only become a widespread phenomenon in the past decade with the introduction of A.I.D. and in vitro fertilization. The practice is on the rise and has resulted in a great deal of controversy.¹¹³ Because many states have laws forbidding "baby-selling" in some form,¹¹⁴ opponents of surrogate motherhood argue that contracts in which a woman agrees to conceive, carry, and relinquish parental rights to a child violate these prohibitions. This was the approach taken in the 1983 Oklahoma Attorney General's opinion.¹¹⁵ After its conclusion that artificial insemination of single women is prohibited, the opinion considers the possibility of a married surrogate mother. It focused on Title 21, Section 866 of the Oklahoma Statutes, which defines the crime of trafficking in children as:

(1) [a]cceptance of any compensation, in money, property or other thing of value, at any time, from the person or persons adopting a child, by any person, for services of any *kind* performed or rendered or purported to be performed or rendered, in connection with such adoption.¹¹⁶

Relying on this language, the opinion concludes:

[T]he surrogate and her husband would be prohibited by the trafficking in children Statute from receiving compensation other than medical and reasonable attorney fees. That one of the prospective adoptive parents would also be a biological parent does not alter the fact that a surrogate agreement interjects compensation in an adoption proceeding beyond those expenses specifically excepted by statute.¹¹⁷

This part of the opinion rests on firmer ground than the dicta regarding A.I.D. of single women. However, it is not necessarily correct. The Trafficking in Children Act was passed in 1965 at a time when artifi-

112. *Genesis* 16:2.

113. *E.g.*, Galen, *Surrogate Law*, Nat'l L.J., Sept. 29, 1986, at 1, col. 1.

114. *See* ALA. CODE § 26-10-8 (1975); ARIZ. REV. STAT. ANN. § 8-126(c) (1974); CAL. PENAL CODE § 273(a) (West 1983); COLO. REV. STAT. § 19-4-115 (1986); DEL. CODE ANN. tit. 13, § 928 (1984); FLA. STAT. ANN. § 63.212 (West 1985); GA. CODE ANN. § 19-8-19 (1982); IDAHO CODE § 18-1511 (1986); ILL. ANN. STAT. ch. 40 §§ 1526, 1701-03 (Smith-Hurd 1986); IND. CODE ANN. § 35-46-1-9 (Burns 1984); IOWA CODE ANN. § 600.9 (West 1986); KY. REV. STAT. § 199.590(2) (1986); MASS. GEN. LAWS ANN. ch. 210, § 11a (West 1984); MICH. COMP. LAWS ANN. § 710.54(2) (West 1986); NEV. REV. STAT. § 127-290 (1985); N.J. STAT. ANN. § 9.3-54 (West 1984); N.Y. SOC. SERV. LAW § 374(6) (McKinney 1983); N.C. GEN. STAT. § 48-37 (1984); OHIO REV. CODE ANN. § 3107.10 (Page 1983); S.D. CODIFIED LAWS ANN. § 25-6-4.2 (1984); TENN. CODE ANN. § 36-1-135 (1984); UTAH CODE ANN. § 76-7-203 (1978); WIS. STAT. ANN. § 946.716 (West 1986).

115. Attorney General Opinion, *supra* note 17.

116. OKLA. STAT. tit. 21, § 866 (1981) (emphasis added).

117. Attorney General Opinion, *supra* note 17, at 279.

cial insemination and surrogate motherhood were virtually unknown. The statute was intended to apply to "black market" adoptions of babies, not to the surrogate motherhood situation. Three state courts have considered whether similar statutes are applicable to surrogate motherhood arrangements and have reached conflicting conclusions. In *Doe v. Kelley*,¹¹⁸ a Michigan circuit court prohibited payment for a surrogate mother, a result which for practical purposes abolished the practice in the state.¹¹⁹ The court relied on traditional negative attitudes toward baby-selling: "The evils attendant to the mix of lucre and the adoption process are self-evident and the temptations of dealing in 'money-market babies' exist whether the parties be strangers or friends."¹²⁰

The opinions of at least three Attorney Generals have also addressed the issue and reached results similar to Oklahoma's Attorney General. In a 1982 opinion,¹²¹ the Kansas Attorney General relied upon the "long-standing legal principle and public policy that children are not chattel and therefore may not be the subject of a contract or gift."¹²² In Kentucky, the Attorney General's opinion¹²³ focused on the activities of Surrogate Parenting Associates (S.P.A.), a Louisville-based organization.¹²⁴ Like the Oklahoma opinion, the Kentucky Attorney General relied upon statutory authority, primarily the provision that "[n]o person, agency, or institution not licensed by the cabinet may charge a fee or accept remuneration for the procurement of any child for adoption purposes."¹²⁵ He concluded that "[t]he public policy behind these statutes is clear: The Commonwealth of Kentucky does not condone the purchase

118. 6 Fam. L. Rep. (BNA) 3011, 3013-14 (Mich. Cir. Ct. 1980), *aff'd*, 106 Mich. App. 169, 173-74, 307 N.W.2d 438, 441 (1981), *cert. denied*, 459 U.S. 1183 (1983). The case did not invalidate the contract per se, but stated that any change allowing compensation for the mother would have to come from the legislature.

119. A few women have agreed to have a baby for altruistic motives, often in situations where they are related or otherwise close to the infertile couple, see Beck, *To My Sister, with Love*, MC-CALLS, Sept. 1981, at 83. Such situations are rare however, most women who become surrogate mothers do so for financial reasons. See Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY, 117 (1983), in which 89% of the women surveyed said they required a fee for their participation; most required at least \$5,000.

120. 6 FAM. L. REP. (BNA) at 3014.

121. Op. Kan. Att'y Gen. No. 150 (1982). For a discussion of this opinion, see Note, *Surrogate Motherhood: Contractual Issues and Remedies under Legislative Proposals*, 23 WASHBURN L.J. 601, 607-09 (1984).

122. *Id.*

123. 81 Op. Ky. Att'y Gen. 18 (1981). For a detailed examination and criticism of this opinion, see Note, *In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience*, 69 KY. L.J. 877 (1981).

124. For a complete description of this organization, see promotional pamphlet on file at the Tulsa Law Journal office [hereinafter S.P.A. pamphlet].

125. KY. REV. STAT. § 199.590(2) (1977).

and sale of children."¹²⁶ Similarly, the Ohio Attorney General wrote that compensation of a surrogate violated Ohio laws.¹²⁷

The Supreme Court of Kentucky ultimately overruled the Attorney General's opinion.¹²⁸ It emphasized that "there are fundamental differences between the surrogate parenting procedure in which SPA participates and the buying and selling of children as prohibited by KRS 199.590 (2) which places this surrogate parenting procedure beyond the purview of present legislation."¹²⁹ The New York Surrogate's Court also considered whether a prohibition against payments with regard to adoption could be applied to a surrogate motherhood contract. After discussing the Kentucky case, the court in *In Re Adoption of Baby Girl*¹³⁰ concluded that:

[T]his court, in spite of its strong reservations about these arrangements both on moral and ethical grounds, is inclined to follow the majority opinion by finding that biomedical science has advanced man into a new era of genetics which was not contemplated by either the Kentucky legislature nor by the New York legislature when it enacted SSL 374(6) prohibiting payments in connection with an adoption. Current legislation does not expressly foreclose the use of surrogate mothers or the paying of compensation to them under parenting agreements. Accordingly, the court finds that this is a matter for the legislature to address rather than for the judiciary to attempt to determine by the impermissible means of "judicial" legislation.¹³¹

If the logic of the Kentucky and New York courts is correct, then the Oklahoma statute, which also does not expressly forbid surrogate parenting and which was drafted at a time when such arrangements were not contemplated, should not be read to prohibit the practice. Legislation which would ban surrogate parenthood arrangements entirely has been introduced in Oklahoma.¹³² This is support for the proposition that the Child Trafficking Act does not apply to such arrangements.

126. 81 Op. Ky. Att'y Gen. 18 at 5 (1981).

127. 83 Op. Ohio Att'y Gen. 1 (1983).

128. *Surrogate Parenting Assocs., Inc. v. Commonwealth*, 704 S.W.2d 209 (Ky. 1986).

129. *Id.* at 211.

130. *In re Adoption of Baby Girl*, 505 N.Y.S.2d 813 (N.Y. Surrogate's Ct. 1986).

131. *Id.* at 817-18.

132. Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 FAM. L. REP. (BNA) 3001, 3003 (1985). According to the Pierce report, about 20 states have considered some sort of regulation of surrogate parenting arrangements. Three other jurisdictions other than Oklahoma — Alabama, the District of Columbia and Kentucky — have considered banning the arrangements, 15 others — Alaska, California, Connecticut, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, South Carolina, and Virginia — have considered legalizing the arrangements in some form. To date, no legislation has passed. See Comment, *Surrogate Motherhood in California: Legislative Proposals*, 18 SAN DIEGO L. REV. 341 (1981) for a discussion of the California legislation.

On the other hand, the Michigan court may have been correct in applying its statute broadly to prohibit all forms of payment for adoption arrangements, even those not expressly forbidden by the statute. In any event, the New York Court's emphasis on the need for legislative consideration of the problem is appropriate. The questions as to the legality of surrogate motherhood in Oklahoma are too important to be resolved by an ambiguous 1965 law which does not directly address the issues.

B. *Constitutional Issues Raised by Surrogate Parenthood Arrangements*

1. Introduction

Advocates of surrogate motherhood arrangements claim that the parties to the contract have constitutional rights to procreate which cannot be prohibited;¹³³ opponents argue that the arrangements violate the thirteenth amendment prohibition against slavery.¹³⁴ To date, case law on these constitutional claims has been sporadic and inconclusive. The Michigan Court of Appeals acknowledged that "the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy. . .," but stated that the statute did not prohibit the surrogate mother from having the child, rather the statute merely prohibited the prospective parents from compensating her.¹³⁵ The New York and Kentucky decisions, upholding surrogate parenting arrangements, based their holdings on statutory interpretation, not constitutional grounds.¹³⁶ Most of the law review discussion of the issue argues that the right to procreate encompasses surrogate motherhood arrangements,¹³⁷ but the issue remains unresolved. The next section of this article summarizes the constitutional issues raised by the practice.

2. The Thirteenth Amendment and Surrogate Motherhood

The thirteenth amendment, one of the Civil War amendments, states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall

133. E.g., Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147; Robertson, *Surrogate Mothers: Not So Novel After All*, THE HASTINGS CENTER REP., Oct. 1983, at 28; Coleman, *supra* note 5; Note, *supra* note 39; Note, *supra* note 43; Note, *supra* note 123.

134. Note, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467, 476-77 (1982).

135. *Doe v. Kelley*, 106 Mich. App. 169, 173, 307 N.W.2d 438, 441 (1981), *cert. denied*, 459 U.S. 1183 (1983).

136. See *supra* notes 128-30 and accompanying text.

137. See *supra* note 133.

exist within the United States, or any place subject to their jurisdiction."¹³⁸ Opponents of surrogate motherhood characterize the procedure as "baby-selling," identical to the practice of slavery and prohibited by the thirteenth amendment.¹³⁹ This argument will almost certainly fail.

First, the legislative history of the thirteenth amendment clearly indicates an intent to abolish all shades and conditions of African slavery¹⁴⁰ as practiced in the United States.¹⁴¹ Attempts to extend the amendment to other situations, such as the practice of segregation, have failed.¹⁴² The amendment has been interpreted narrowly, which makes its expansion to a surrogate parenting contract highly unlikely.

Second, although a woman who agrees to relinquish a child for compensation may be "selling" the child, she is certainly not selling the child into slavery or involuntary servitude, the conditions prohibited by the thirteenth amendment. It is true that she exercises control over the infant, but this is not any different than the control exercised by any mother relinquishing a child for non-pecuniary reasons. A child simply cannot be viewed as being owned by his adoptive parents,¹⁴³ one of whom will be his natural father in a typical surrogate parenting arrangement.¹⁴⁴

138. U.S. CONST. amend. XIII.

139. Note, *supra* note 134, at 476-477. The student author argues that "[w]hile the letter of the thirteenth amendment is not violated by surrogate agreements, its spirit may be compromised. This spirit has been articulated as the belief that 'the sovereign has an interest in a minor child superior even to that of the parents; hence, there is a public policy against the custody of such child becoming the subject of barter.'" *Id.* at 477 (quoting 6 S. WILLISTON, CONTRACTS § 1744 A (rev. ed. 1936)).

140. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

141. *Id.*

142. The Court has ruled that mere discrimination on account of race or color is not regarded as a badge of slavery, *Id.* at 25. The amendment has been used as authority to give Congress power to outlaw racial discrimination by statute, *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Perhaps by analogy, it could be used as authority for a federal statute outlawing surrogate parenthood contracts, although this result is by no means certain.

143. It is clearly established today that children have "rights" which cannot be abrogated by their parents. For a critique of this expansion of common law, see Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their 'Rights,'* 1976 B.Y.U. L. REV. 605, 608-09.

144. Of course, every surrogate parenting contract may not involve adoption of the child by the natural father—an infertile husband with an infertile wife or an infertile single woman may contract with a fertile woman to bear a child by A.I.D. from an anonymous donor. Additionally, the egg of a woman unable to bear a child may be fertilized with her husband's sperm through in vitro fertilization and placed in a third woman's womb. This woman is referred to as a surrogate gestational mother.

3. The Right of Procreation and Surrogate Motherhood

a. *The Rights of the Surrogate Mother*

An earlier section of this article argues that a woman, married or single, has a fundamental right to procreate through artificial insemination.¹⁴⁵ It is unlikely, however, that this right can be extended to entitle a woman to receive compensation for exercise of the procreation right. At best, a woman can only assert that a regulation prohibiting compensation deprives her of an economic right, and it is well settled that a state need only assert a rational basis for discriminatory laws affecting economic interests.¹⁴⁶

b. *The Rights of the Surrogate Father*

There is no question that a man has a right to procreate in the traditional, "natural" manner.¹⁴⁷ It is less clear whether this right extends to a constitutional right to enter into a surrogate parenting contract.

If a man is married to an infertile woman, or if he is single, surrogate parenting may represent his only meaningful chance to exercise his right to procreate. For all practical purposes, a woman utilizing A.I.D. does not require a man's active or continual participation to bear a child; once the man has spent a few minutes donating sperm his role is usually over.¹⁴⁸ Even if A.I.D. is not available to a fertile woman, it is at least theoretically possible for her to conceive a child by a man, who, if asked, would refuse. In contrast, a man, who cannot physically bear children, must rely on a cooperating woman in order to create a child. If he attempts the strategy of engaging in sexual intercourse with a woman without discussing his wish to have a child, he runs a substantial risk that if the woman becomes pregnant she will have an abortion — a choice he would be unable to prevent.¹⁴⁹ Additionally, he would not have an abso-

145. See *supra* notes 48-68 and accompanying text.

146. E.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See generally Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classification*, 68 Ky. L.J. 845 (1980).

147. For an argument that the right to procreate applies to men as well as women, see *supra* notes 48-68 and accompanying text.

148. In a few cases, the donor who wishes to assert fatherhood rights, such as visitation, has been successful, e.g., *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977). However, these situations involved men who knew the mother personally and were aware of her use of their sperm. In the more typical situation, a donor goes to a doctor, signs a waiver form, and does not know if he has actually fathered a child or the identity of the mother. Similarly, the mother does not know the identity of the donor.

149. *Planned Parenthood Ass'n v. Danforth*, 428 U.S. 52 (1976) (striking state law requiring father's consent for abortion).

lute right to question the pregnant woman as to the child's parentage. Even if he is determined to be the father, he would not be guaranteed custody of the child. The mother choosing to keep the child would probably win a custody battle.¹⁵⁰ The unwed father does not even have an unlimited right to block the mother's decision to give up the child for adoption.¹⁵¹ Although a few women may voluntarily agree to aid a prospective father, most women would only choose to do so for compensation.¹⁵² A man's ability to procreate can be properly viewed as contingent on his right to enter into a surrogate contract. Therefore, it is quite possible that courts may decide that this right is fundamental.

On the other hand, as has been discussed, the current Supreme Court exhibits a reluctance to extend the fundamental right of privacy beyond its current bounds.¹⁵³ Additionally, unlike the situation of a single woman obtaining A.I.D., in a surrogate contract situation a second party, the surrogate mother, has interests that are also affected. Therefore, it is a close question as to whether a court would find that the right to procreate through a surrogate parenthood contract which includes compensation is a fundamental right.

If there is a fundamental right to procreate through a surrogate parent contract, the state's interest in restricting this interest must be compelling. The state's primary reasons for preventing such a contract would be to prohibit baby-selling and to protect the surrogate mother.

c. *The Rights of Infertile Women*

Infertile single women and married women with fertile husbands may also wish to participate or engage in surrogate motherhood arrangements. The single woman can pay for the A.I.D. of the fertile woman and the married woman can become a party to an arrangement in which her husband's sperm is used to create a child. A few commentators have argued that these women have a fundamental right to procreate and that

150. Most custody awards continue to go to the mother, particularly in states which continue to employ the tender years doctrine.

151. See, e.g., *In re Baby Boy S.*, 349 So. 2d 774 (Fla. Dist. Ct. App. 1977) (allowing a child to be put up for adoption upheld despite the lack of finding of father's unfitness); *In re K.*, 535 S.W.2d 168 (Tex. 1976), cert. denied, 429 U.S. 907 (1976). For an argument that the decision of the unwed mother as to custody of the child should prevail over the unwed father's wishes, see Erickson, *The Feminist Dilemma Over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority*, 2 LAW AND INEQUALITY 447 (1984).

152. See *supra* note 119.

153. E.g., *Bowers v. Hardwick*, 106 S. Ct. 2841, reh'g denied, 107 S. Ct. 29 (1986); see *supra* notes 57-62 and accompanying text.

laws which prohibit surrogate motherhood violate this right.¹⁵⁴ As sympathetic as this argument is, it will probably fail. The right to procreate arguably assumes an ability to procreate. In essence, extending the right to procreate to a right for an infertile woman to enter into a surrogate motherhood contract would be creating a constitutional right to be a parent of a child. Yet, it has been established that there is no constitutional right to adopt a child.¹⁵⁵ Arguably, the surrogate parenthood situation is different. The adoption cases state that the court does not have to award an existing child to a prospective parent; a prohibition on surrogate parenting would prevent an arrangement about an unborn child. Nevertheless, it is unlikely that a right to procreate can be found in someone who is unable to conceive a child.

C. *Legalization of Surrogate Parenting Arrangements: Pro and Con*

1. Introduction

There are countless arguments as to whether surrogate motherhood arrangements are desirable.¹⁵⁶ These arguments can be summarized as presenting two major issues:

1. Should the state permit or ban surrogate parenting arrangements?
2. If allowed, can a surrogate motherhood contract prevent a woman from refusing to conceive, from obtaining an abortion, or from refusing

154. See Williams, *Differential Treatment of Men and Women by Artificial Reproduction Statutes*, 21 TULSA L.J. 463 (1986). The author argues that A.I.D. statutes violate the equal protection clause because they allow infertile husbands to exercise their right of procreation, but do not permit the infertile woman to exercise her right of procreation through a surrogate motherhood contract. *Id.* at 471-83. The argument is interesting, but will probably fail because of the strong possibility that a court would find that an infertile person does not possess a right to procreate. For a rejection of the concept of a right to procreate for infertile persons, see Comment, *supra* note 12, at 980. The author argues, "It is nature, and not the state, which frustrates an infertile couple's desire to bear or beget a child."

155. See *Anguis v. Superior Court*, 6 Ariz. App. 68, ___, 429 P.2d 702, 706 (1967).

156. The Report on Fertility and Sterility, published by the American Fertility Society, [hereinafter Fertility Society Report] summarizes many of these arguments. There is extensive law review literature on the subject, primarily dominated by student work. See, e.g., Curlin & Miley, 41 BENCH AND BAR. NO. 1 (1984); Mawdsley, *Surrogate Parenthood: A Need for Legislative Directives*, 71 ILL. B.J. 412 (1983); Comment, *Surrogate Motherhood: The Attorney's Legal and Ethical Dilemma*, 11 CAP. U. L. REV. 593 (1982); Coleman, *supra* note 5; Robertson, *supra* note 133; Rushevsky, *Legal Recognition of Surrogate Gestation*, 7 WOMEN'S RTS. L. REP. 107 (1982); Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639 (1983); Handel, *Surrogate Parenting, In Vitro Insemination and Embryo Transplantation*, 6 WHITTIER L. REV. 783 (1984); Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641 (1984); Note, *Surrogate Parenthood--An Analysis of the Problems and a Solution: Representation for the Child*, 12 WM. MITCHELL L. REV. 143 (1986) [hereinafter Child Representation Note]; Williams, *supra* note 154; Shapiro, *supra* note 88; Kentucky Experience Note, *supra* note 123; Reproductive Technology Note, *supra* note 43; Note, *supra* note 39; Note, *supra* note 134; Comment, *supra* note 132; Note, *supra* note 121.

to relinquish parental right to the child in accordance with the terms of the contract?¹⁵⁷

2. Baby-Selling

Opponents of surrogate motherhood argue that the practice constitutes baby-selling, a practice that has always offended public morality. A Michigan circuit court in *Doe v. Kelley*¹⁵⁸ expresses this sentiment:

Mercenary considerations used to create a parent-child relationship and its impact upon the family unit strikes at the very foundation of human society and is patently and necessarily injurious to the community.

It is a fundamental principle that children should not and cannot be bought and sold. The sale of children is illegal in all states.¹⁵⁹ State laws forbidding baby-selling are based on disapproval of "black-market" adoptions, in which children are often sold by unscrupulous intermediaries to the highest bidder, without regard for the interests of the unwed mother, or the child's welfare.¹⁶⁰ However, as has been discussed,

157. There are numerous other questions that must be asked regarding surrogate parenthood contracts if such contracts are permitted. An excellent student discussion of the subject lists the following:

1. Who may participate?
2. How may the suitability of individual participants be determined?
3. What type of acts should fall within the scope of any proposed regulation?
4. What type of medical supervision should be required?
5. What are the rights and obligations of the surrogate during pregnancy?
6. What are the rights and obligations of the natural father (and his spouse, if he is married) during pregnancy?
7. What are the rights and obligations of the respective parties after live birth?
8. What are the rights and obligations of the respective parties after miscarriage or stillbirth?
9. What compensation may the surrogate receive?
10. What is the legal status of the child at birth?
11. What steps must the surrogate take to surrender her rights as parent?
12. What steps must the natural father take to assert his rights as parent?
13. What steps must the natural father's spouse take to gain or assert parental rights?
14. What procedures must the surrogate follow if she decides to keep the child?
15. What are the rights and obligations of the natural father if the surrogate decides to keep the child?

Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1288 (1985). This Article does not discuss all these questions; however, many of the issues are partially resolved by its proposed legislation, *infra* notes 192-212 and accompanying text. The Note provides extensive suggested legislation as to these issues; however, legislative resolution of every conceivable issue raised by surrogate contracts may hinder flexibility and lock the parties into undesirable results.

158. 6 FAM. L. REP. (BNA) 3011 (Mich. Cir. Ct. 1980), *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983).

159. *Id.* at 3013.

160. See generally Turano, *Black-Market Adoptions*, 22 CATH. LAW. 48 (1976). Black market adoptions must be distinguished from independent adoptions, often characterized as "gray market adoption," in which the mother receives compensation for her medical and legal expenses. See Note, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715 (1950); The gray

two state courts have found that these statutes do not apply to surrogate parenthood situations.¹⁶¹ Moreover, a few cases have upheld arrangements in which a child's parent received some compensation in return for relinquishment of custody. In *Reimche v. First National Bank of Nevada*,¹⁶² the Ninth Circuit upheld an agreement in which an unwed mother promised to give custody of her child to the child's father, in exchange for his promise to provide for the mother in his will. Similarly, in *In Re Estate of Shirk*,¹⁶³ a Kansas court upheld a contractual agreement in which a mother consented to her child's adoption by its maternal grandmother in exchange for the grandmother's promise to leave money to the mother and the child. The court emphasized that the case involved a "family compact,"¹⁶⁴ which suggests that surrogate parenthood arrangements involving the natural father would similarly be upheld.

Proponents of surrogate parenting argue that the practice is very different from the black market transactions of which laws against baby-selling were intended to prevent. They characterize the mother as being paid for her *service* of conceiving and carrying the baby, not for the child itself. Unlike the traditional unwed mother, a surrogate mother chooses to become pregnant for a fee, in lieu of taking some other job. In essence, she "rents her womb"¹⁶⁵ to the prospective father and this performs a service that the man must hire someone to do. The woman entering into a surrogate motherhood contract does so *prior* to conception when she is not subject to pressure and is able to make a rational, informed decision.¹⁶⁶ Opponents say that characterizing a surrogate mother as being paid for her "services" is only playing word games, the bottom line is the same as in black market transactions — a woman receives a sum of money to relinquish a child.

market option is permitted in Oklahoma, Child Trafficking Act, OKLA. STAT. tit. 21, § 866 (Supp. 1986) (permits payment of a mother's medical and legal expenses, and her "reasonable domiciliary care"). For a thorough discussion of independent adoption in Oklahoma, see Evans, *Independent Adoptions: In Whose Best Interests?*, 53 OKLA. BAR. J. 1805 (1982).

The disapproval of baby-selling in the independent adoption context is not universal. In a provocative article, Judge Posner and a co-author have suggested that a free market of babies would be the best way to satisfy the demand, induce women not to have abortions, and to relinquish their children, Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 343 (1978).

161. See *supra* notes 128-130 and accompanying text.

162. 512 F.2d 187, 189 (9th Cir. 1975). See also *Clark v. Clark*, 122Md. 114, 89 A. 405 (1913).

163. 186 Kan. 311, 350 P.2d 1 (1960).

164. *Id.* at 324, 350 P.2d at 12.

165. One student note begins with the following hypothetical advertisement: "Womb for rent. \$15,000 plus expenses. Limited Warranty on services, professional supervision, confidentiality guaranteed." Note, *supra* note 121, at 601.

166. For further discussion of this argument, see *infra* note 190 and accompanying text.

The decision whether to label surrogate motherhood arrangements as "baby-selling" or "contracts for services" really depends on one's preconceived opinion of such practices. The major concern about unfit parents can be alleviated by stricter regulation of the practice. Moreover, in most surrogate parenting situations, unlike the black market, the child's natural father gains custody, a person who is presumably not an unfit parent. The real concern may be the large amounts of money involved, typically as much as \$25,000¹⁶⁷ and an aversion to a "bidding process." These concerns can be alleviated by laws limiting the amount of money that can be paid and regulations which prevent the mother from selling a child to a party outside the contract for more money.¹⁶⁸

3. Exploitation of the Surrogate Mother

Many feminists oppose surrogate parenting contracts due to their concern for the prospective mother, who is usually a married, lower-class woman.¹⁶⁹ They feel that these women are subject to economic duress and forced into a situation which will present serious physical and emotional risks. This is a powerful argument and one that cannot be taken lightly. Contra-arguments that women must be free to enter into a surrogate motherhood contract comes close to arguments that bakers must be "free" to contract to work long hours with low wages under unsafe conditions.¹⁷⁰

Despite this very real concern, this author believes that women

167. See, e.g., Shapiro, *supra* note 88. The Kentucky Board S.P.A. states that the costs will vary, but the typical arrangement will cost \$25,000. S.P.A. pamphlet, *supra* note 124. Usually, the mother receives \$10,000 of this sum.

Many commentators disapprove of the "middleman" or facilitating organization in surrogate parenthood arrangements, whom they view as an unscrupulous profiteer. In accordance with this concern, in England, the Report of the Committee of Inquiry Into Human Fertilization and Embryology (the Warnock Committee) recommended criminal legislation which would forbid "the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilize the services of a carrying mother" AREEN, CASES AND MATERIALS ON FAMILY LAW 890 (2nd ed. 1985). The Economist has described the bill as "the embryo of some extraordinary bad law," Shapiro, *supra* note 88, at 49 n.79.

168. See *infra* notes 210-212 and accompanying text.

169. The Parker survey, Parker, *supra* note 119, shows that over half the women are high school graduates and over one-fourth have schooling beyond high school. See also Blakely, *Surrogate Mothers: For Whom Are They Working?*, MS., March 1983, at 18, 20. Ms. Blakely argues that surrogate mothers are victimized by middle men who make fortunes from their services. She also argues that surrogate parenting raises issues of racism and patriarchal genetics. *Id.*

170. The reference, of course, is to the infamous *Lochner v. New York*, 198 U.S. 45 (1905) which invalidated New York's labor laws, relying on the due process "right of contract" between the bakers and their employees. This opinion is frequently cited as the ultimate example of the "bad old days" of due process.

should be allowed to enter surrogate parenting contracts *if and only if* such contracts are closely regulated to protect their health and emotional stability at all times. A law forbidding women to enter into surrogate motherhood contracts under any set of conditions represents the type of paternalism feminists also deplore.¹⁷¹ There is evidence that for many women who have entered into surrogate parenting contracts in the past few years, the experience has been safe and satisfactory. Many choose to repeat as surrogate mothers.¹⁷² If only women who have had one healthy child are allowed to contract and are carefully examined prior to pregnancy,¹⁷³ the physical risks of bearing a child may be less of a physical risk than other high risk jobs which the mother might have to take instead.¹⁷⁴ Although cases in which a mother refuses to give up her child receive high publicity and create an impression that surrogate motherhood is always emotionally painful, in fact over 95 percent of mothers give up their child without contest.¹⁷⁵ This is not to suggest that the experience is easy, but if a mother knows from the time of conception that she will be expected to relinquish the child, she may be able to prevent herself from forming a strong attachment to the baby.¹⁷⁶ A study of the motivation of potential surrogate mothers suggests that for some women the experience of pregnancy, far from being painful, was pleasant and fulfilling.¹⁷⁷ Some mothers felt "more content, complete, special" because of their pregnancy.¹⁷⁸ Others wanted to become pregnant to

171. As Justice Brennan stated in *Frontiero v. Richardson*, 411 U.S. 677 (1973), "[t]raditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Id.* at 684.

172. KEANE, *supra* note 1.

173. This proposal has been made by several commentators and is part of this Article's proposal, see *infra* notes 201-212 and accompanying text.

174. Lori Andrews, Medical Law Director of the American Bar Foundation argues that, "The notion that it's unethical to pay women to take the risks of surrogate mothering overlooks a number of things: that there are many kinds of dangerous work — race car driving, coal mining — where people are compensated for taking risks." Galen, *supra* note 113 at 8.

175. Noel Keane notes that he has represented nearly 150 couples in the past 11 years and in only one situation has the custody decision been challenged. He states, "The others have been marked by very real trust, comfort and mutual support by both the couples and the surrogates." Chicago Tribune, Sept. 27, 1986, § 1, at 12, col. 4. A recent article, Galen, *supra* note 113, states that there have been at least four situations where the surrogate mother refused to relinquish the child.

176. The Parker survey quotes mothers as admitting they would feel loss, but as making comments such as, "I'm only an incubator," "I'd be nest watching," and "I'll attach myself in a different way — hoping it's healthy." Parker, *supra* note 119, at 118.

Despite these comments, this article does not suggest the experience of relinquishing the child will be acceptable for all surrogate mothers, and consequently it argues that a mother must have a personal right of non-relinquishment, see *infra* notes 190-191 and accompanying text.

177. *Id.* at 118.

178. *Id.*

compensate for their feelings of guilt for a previous abortion.¹⁷⁹

Some feminists also object to the practice as reinforcing stereotypes of the woman as child bearer.¹⁸⁰ These feminists argue that surrogate parenting agreements turn the woman into the ultimate servant of man, and whose principle duty is to bear children. In her novel, *The Handmaiden*,¹⁸¹ Margaret Atwood creates a country ruled by fundamentalist men in which childbearing-age women become slaves forced to bear children. If artificial insemination, which for all practical purposes makes childbearing without men a reality, is the dream of radical feminists, then surrogate motherhood could become the ultimate nightmare. Surrogate motherhood can also be viewed as the ultimate extension of the male ego — the insistence of the male that the child must bear his genes.

Any feminist critique of surrogate motherhood which focuses on one party to the arrangement, and ignores the interests of the other parties, particularly the interest of the infertile wife, is too simplistic. While it may be true that surrogate motherhood reinforces a concept of a woman as a childbearer, the fact remains that women *are* the only sex able to bear a child. If this ability can be utilized in a productive manner in an arrangement which can bring satisfaction to all concerned, it should not be frustrated.

4. The Interests of Prospective Parents

Noel Keane, the Executive Director of the Infertility Center of New York, wrote that "[o]ne out of every six American couples is unable to bear a child. It is hard to describe the depression, despair, grief, and rage these couples feel. A woman once described these feelings to me by saying, 'No one ever died from infertility, but you wish you would.'"¹⁸²

Mr. Keane is the leading practitioner in the area of surrogate arrangements, and has an obvious self-interest in the practice, but even his critics cannot claim he overstates the pain and frustration felt by persons unable to conceive a child.¹⁸³ Adoption may be a more socially desirable

179. *Id.*

180. The columnist Ellen Goodman states that "I am uncomfortable . . . with a technology that reduces the pregnant woman to a status of a commercial vessel carrying genes to term for her employer." Goodman, *One Mother or Two*, Wash. Post, April 26, 1986, at A23, col. 1. *Accord* Blakeley, *supra* note 169. A similar analysis has resulted in the decision of the National Organization of Women and the American Civil Liberties Union to oppose a California law allowing pregnant women longer leaves than other disabled workers.

181. ATWOOD, *THE HANDMAIDEN* (1985).

182. Chicago Tribune, Sept. 27, 1986, § 1, at 12, col. 4.

183. A few commentators have raised the possibility that women who are capable of bearing a child will hire a surrogate mother for convenience in order to avoid career problems, health risks,

means of satisfying their need for parenthood, but it is an option open to a dwindling minority of infertile couples or single persons.¹⁸⁴

A few opponents of surrogate motherhood argue that the practice inevitably places a strain on the nuclear family by involving a third party in the husband/wife relationship. The American Fertility Society Report¹⁸⁵ states that:

There is a concern that the involvement of a surrogate mother in childbearing will weaken the marital bond and undermine the integrity of the institution of the family. To some, third party involvement in procreation is considered to be threatening to the sanctity of the marital relationship, whether or not there is provable physical or psychological harm to the participants in the process.¹⁸⁶

Anyone who makes this argument does not understand that infertility presents a far greater threat to a family than a solution which will result in the couple's having children. The infertile woman may feel guilty and suffer severe psychological harm. In the worst-case scenario, the husband may divorce the wife in order to obtain a fertile partner. In nearly every instance, the option of surrogate parenthood can save the family structure, instead of destroying it.

Legalization of surrogate parenting involves certain risks but the risk should be taken in favor of the interests of prospective parents, not against them. The normally "liberal" A.C.L.U., in opposing a law permitting the practice, stated: "We feel we don't know enough about surrogate parenting and should not be rushing to enact a law without appropriate legal and policy and ethical standards."¹⁸⁷

This conservative approach does not properly balance the certainties and uncertainties of surrogate motherhood arrangements. It is a certainty that infertile persons have a strong need for a child, and that for many these arrangements satisfy this need. It is uncertain what effects

and other inconveniences. Fertility Society Report, *supra* note 156 at 648. Not too suprisingly, this hypothetical practice is condemned. However, it is highly unlikely that a woman who wants children would choose not to have her own child. To date, there have been no recorded instances of a "convenience" surrogate motherhood situation. If a legislature is concerned about this remote possibility, it can pass legislation requiring that the wife of a husband entering into a surrogate contract must provide proof of infertility.

184. See *supra* notes 4-8 and accompanying text.

185. Fertility Society Report, *supra* note 156.

186. *Id.* at 64. Closely tied to this argument are concerns based on religious beliefs, which this article will not address. However, it does suggest that because a practice offends religious beliefs is insufficient grounds to deny it to a nonmember of the religion.

187. Galen, *supra* note 113, at 10. The California bill would have provided for payment to the surrogate and created a presumption that the sperm donor would be the father to a child born 300 days after conception.

these arrangements have on surrogate mothers, surrogate children,¹⁸⁸ and society in general. Taking these factors into account, a better approach would be to focus on the known interest of prospective parents, rather than the unknown problems which may or may not be significant. The A.C.L.U. should have stated that states should not "be rushing" into laws banning surrogate motherhood contracts until there is solid evidence of their harm.

5. The Enforceability of Contractual Provisions Regarding the Surrogate Mother

In a highly publicized case, the father of a baby girl has gone to court to attempt to enforce his contractual arrangement with the child's surrogate mother.¹⁸⁹ When decided, this case will be the first official determination as to whether a contractual provision in which the mother agrees to relinquish the child at birth is enforceable.

Many commentators argue that a mother who enters into a surrogate motherhood contract has had ample time to make a rational, fully-considered decision and must be bound to this decision. As one proponent puts it:

The surrogate's pregnancy is purposeful and planned. She negotiates the surrogate parenthood contract with the natural father, and only when she is satisfied with it does she undergo insemination. She is under no time constraints because she can negotiate for as long as she feels is necessary before accepting the contract and agreeing to the requirement that she terminate her parental rights to the child. She generally makes a decision only after her careful consideration of all aspects of the arrangement in consultation with legal, medical, and psychological/psychiatric counsel. In short, traditional legal thinking about termination of parental rights and responsibilities does not apply

188. Several commentators have expressed concern as to the psychological effects on the child born as a result of a surrogate parenting arrangement. However, there is no real evidence to date that the child will suffer more harm than any other adopted child. Moreover, he or she will probably have at least one biological parent. For an argument that if surrogate parenting arrangements are allowed, a representative of the child's interest should be appointed, see Child Representation Note, *supra* note 156.

189. Galen, *supra* note 113 at 1, 8. The mother, a housewife, entered into an arrangement with a New Jersey couple through Noel Keane's Infertility Center. She was to be paid a fee of \$10,000. Her sixteen-page written agreement stated that "she will not form or attempt to form a parent-child relationship with any child . . . and [she] shall freely surrender custody to [the child's natural father] immediately upon birth of the child; and terminate all parental rights to said child pursuant to this agreement." When the child was born, she refused to surrender her to the contracting couple, who then sued her for breach of contract, specific performance, and temporary custody. In May, the couple was awarded temporary custody, but the mother left the state with the child. She was eventually apprehended and the couple received custody. The trial will be held in the Chancery Division of the Superior Court of New Jersey.

to surrogate parenthood arrangements.¹⁹⁰

This argument does not take into account the nature of pregnancy. The emphasis is on the negotiating period *prior* to conception, but it ignores the period from conception to birth. It is impossible for a woman to predict in advance how she will feel during pregnancy. As she carries a child and begins to feel it move inside her, her emotional attachment to the child may grow beyond her original expectations. Therefore, she should not be bound to a provision forcing her to relinquish the child. A provision in which the mother agrees not to abort, which involves a waiver of a fundamental constitutional right,¹⁹¹ should also be unenforceable.

D. *A Legislative Proposal*

The majority of the commentators are either completely for or completely against surrogate motherhood contracts for compensation. Proponents argue the arrangement is desirable, for all of the reasons discussed, and that it should be treated as a contract which binds the mother to relinquish the child.¹⁹² Opponents argue that payment may never be permitted.¹⁹³ Both sides partially ignore social realities. It is highly unlikely that a total ban on the practice could ever be effective. As Noel Keane has stated, "nobody can stop surrogate parenting. . . . The worst thing [courts and legislatures] can do is to say, 'We're not going to allow it in any form.' The second worst thing they can do is to ban the payment. They'll drive it underground."¹⁹⁴ As the continued growth of the "black market" for babies illustrates,¹⁹⁵ childless parents

190. Note, *supra* note 157, at 1292.

191. It is true that constitutional rights can be waived, but such a waiver is closely scrutinized and must be made with thorough knowledge of the situation. *Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972). A woman cannot know in advance her feelings regarding pregnancy and cannot be said to execute a knowing waiver of the abortion right. A student note which proposes a Uniform Surrogate Parentage Act makes a contrary argument, emphasizing the fact that prior to signing the contract, the mother can thoroughly consider the ramifications of her waiver. Note, *supra* note 157, at 1314-15.

192. *E.g.*, Keane, *supra* note 133; Coleman, *supra* note 5; Uniform Surrogate Act Note, *supra* note 157.

193. *E.g.*, Comment, *supra* note 132; Note, *supra* note 39. The National Committee for Adoption opposes the practice in all forms, stating: "So called surrogate mothering entails legal and moral problems which affect children and parents adversely and divert attention from the needs of children to have permanent, stable secure homes and families," Policy Statement, National Committee on Adoption.

194. Galen, *supra* note 113, at 10.

195. See *Adoption and Foster Care, Hearings Before the U.S. Senate Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 175-76 and 220-29 (1975).

usually feel a desperate need for a child, a need which may drive many of them to break the law. Keane's prediction is undoubtedly correct, although it is not necessarily a conclusive argument against outlawing the practice.

On the other hand, although the issue is yet to be resolved, it is difficult to imagine a court treating a surrogate motherhood contract as it would any other contract and ignoring the serious constitutional and public policy issues such contracts present. It is totally inconceivable that a court would order a woman to be artificially inseminated,¹⁹⁶ or to carry a baby to term when she wishes an abortion,¹⁹⁷ and unlikely that on contractual principles alone it will force her to relinquish the child.¹⁹⁸

At least one commentator¹⁹⁹ and the authors of proposed legislation in Kansas²⁰⁰ concluded that the way to resolve the difficult issues of surrogate motherhood and to take into account these realities would be to permit a man and a woman to enter into a contract, but to give the mother the right to void the contract at any time. This proposal is a step in the right direction, but it unfairly places all legal obligations on the father. The following numbered paragraphs comprise a set of legislative guidelines²⁰¹ which are tailored to balance both parties' rights.

- (1) Surrogate parenting contracts will be permitted, but will be subject to the restrictions delineated in further sections of this bill.

196. See Coleman, *supra* note 5, at 83-84. Professor Coleman argues this provision would violate the public policy against involuntary servitude.

197. Commentators disagree as to what would be the result if the surrogate mother expressly waived her right to an abortion. Professor Coleman, *supra* note 5, at 85, argues that "[e]ven if the argument were advanced that the surrogate, at the time of contract, made a knowing and intelligent waiver of the right to abort, it is highly unlikely a court would allow the natural father to deny her the right to terminate the pregnancy." She relies on the cases stating that a father cannot force his wife to terminate her pregnancy to support this conclusion. In contrast, a student note concludes that a knowing waiver of the abortion right would be upheld, *e.g.*, Note, *supra* note 157, at 1313-1316.

198. Even if a court were to characterize a surrogate parenthood arrangement as a contract for services, instead of an illegal baby-selling agreement, it would probably not order the mother to relinquish the child because specific performance is not the appropriate remedy for a service contract. RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1979).

199. Kentucky Experience Note, *supra* note 123, at 901. "[S]urrogate parenting contracts should be considered legal but voidable custody contracts that are ratified upon entry of a final judgment terminating the parental rights of the surrogate mother." The contract would not be voidable on the part of the couple. *Id.* at 904.

200. See Comment, *supra* note 121, at 618-621, for a discussion of the proposed legislation, Kansas Senate Bill No. 485 (1984). The surrogate mother has the right to declare the contract void. The legislation did not address the question as to what would happen if the sperm donor attempted to declare the contract void.

201. This proposal does not represent actual legislation, because such legislation would presumably be more detailed and might set further restrictions on surrogate parenting contracts, at the discretion of the legislature. For a model of very detailed legislation, see Uniform Surrogate Act Note, *supra* note 157.

Every contract must be filed with the state at its inception. Each party to the contract must be represented by an independent attorney. The prospective father may agree to pay the mother's attorney costs, but this compensation must be arranged in a manner in which the mother's attorney will represent her interest fully and fairly, with no conflict of interest.²⁰²

- (2) Only a woman who is over the age of 21, has previously born at least one healthy child, and has undergone a thorough physical examination by at least two physicians which shows she will suffer no health consequences in her pregnancy will be permitted to enter into a surrogate parenting arrangement. Additionally, the woman must undergo at least one counseling session with a licensed psychologist or psychiatrist and obtain certification that in the professional's opinion she is aware of her responsibilities and is of sufficient emotional stability to carry out these responsibilities.²⁰³
- (3) The mother may be compensated for all her legal and medical expenses. In addition she may receive an agreed-upon payment for her services in bearing the child. This payment *can not exceed* the national average income for the year prior to the contract, as calculated by the United States Department of Labor.²⁰⁴
- (4) The original contract must clearly set forth the agreed-upon compensation and a schedule for payment. The amount of compensation cannot be changed without the agreement of both parties. The contract may provide, subject to the limitations of Section 3, for the principle payment to the mother at the time she relinquishes her parental rights to the child.
- (5) The contract may contain provisions regarding the A.I.D. procedure by which a woman may conceive. The mother may be

202. Robertson, *supra* note 133, also concludes that because of obvious conflicts of interest, one attorney should not represent both parties. It has also been suggested that an attorney should be appointed to represent the interests of the child, *see* Child Representation Note, *supra* note 156.

203. Coleman, *supra* note 5, at 118 also suggests that a legislature should set limits as to the minimum age of the surrogate and provide requirements for medical and psychological testing.

204. Other proposed legislation has set limits as to the maximum amount of compensation the surrogate may receive. The proposed Michigan statute provided that the Department of Public Health would set guidelines as to a maximum fee every two years, but that the maximum fee would not be less than \$10,000. Mich. H.R. 5184, 1981 Sess. § 73, section 95. A proposed New Jersey statute would limit the amount to \$10,000, S.B. No. 481 § 4(e) introduced by Sen. D. Francesco, R. Union County, (1984). The student author of a proposed Uniform Surrogate Parenthood Act sets a limit of \$25,000. Uniform Surrogate Act Note, *supra* note 157, at 1307.

The advantage of the suggested average wage provision is that it allows for inflation, without requiring constant revision of the maximum amount. Additionally, by utilizing an analogy to wages, it reinforces the concept that the surrogate mother is being paid for her services, not for the baby.

If most contracts provide for the maximum limit, surrogate parenthood will continue to be an option not everyone can afford. *See* Handel, *supra* note 156. However, if surrogate parenthood contracts become more common when expressly legalized, market conditions may drive the cost down to an amount below the average wage.

contractually obligated to abstain from sexual intercourse with any one, even her husband, prior to successful conception. It may contain provisions regarding a mother's duty to protect the health of the baby, including a promise not to smoke or drink during the pregnancy.²⁰⁵

- (6) The mother shall have the options of:
 - (a) refusing to undergo the A.I.D.,
 - (b) having an abortion.

These options shall be unqualified — i.e. the mother can exercise them under any circumstances. Moreover, the contract may expressly provide that if she does exercise the first option, she must return all payments received from the first party to the contract. Failure to do so will be a breach of contract and subject the mother to liability for damages. If the mother exercises the option to obtain an abortion, the contract may provide that she must return up to 90% of the payments received *unless* the abortion is necessary for verifiable physical health reasons. In that situation, the contract *cannot* require her to return payments received prior to the abortion and it *must* additionally provide that the father will pay the cost of the abortion.

- (7) If the first party to the contract who has engaged the services of the surrogate mother is a man who has donated his sperm, he may order the surrogate mother to undergo a blood test in order to determine paternity.²⁰⁶ If he is proven not to be the child's natural father, he will not be bound to the other provisions of the contract. The surrogate mother will be held liable for specified damages.
- (8) The party to the contract who has engaged the services of the surrogate mother must agree to take custody of the child regardless of any impairment to the child.²⁰⁷ This obligation will be

205. Coleman, *supra* note 5, at 86, concludes this type of provision, unlike an obligation not to undergo an abortion, would be enforceable, because there is the risk of "potential harm to the child and small burden to the surrogate." *Id.*

206. For a suggested detailed list of blood tests the man may utilize, see Uniform Surrogate Act Note, *supra* note 157, at 1328.

207. One of the obvious problems of a surrogate parenthood contract will be the question of who shall take custody if the child is born with physical or mental problems. In a widely publicized case, a married woman entered into an agreement with a couple to have a child. The child was born with microcephaly, a condition which threatened to leave him severely retarded, Wash. Post., Jan. 21, 1983, at A-11, col. 3. The contracting party decided he did not want the child and ultimately the child was determined to be the child of the surrogate's husband. Andrews, *The Stork Market, The Law of the New Reproductive Technologies*, 70 A.B.A. J. 50, 56 (1984).

In the absence of such a bizarre situation, the party initiating the contract must bear the responsibility for the child. This party has chosen to take the risks and must be bound to his or her responsibility. A surrogate mother would almost certainly find the medical expenses of an impaired child prohibitive.

An obvious drawback of this provision, when coupled with the provision allowing the mother a personal right of non-relinquishment, is that the father has all the burdens of the contract, with no guaranteed benefit of a healthy child.

voidable if the party can prove conclusively that the impairment is due to substantial physical abuse by the surrogate mother and if such abuse is in violation of a provision of the contract.²⁰⁸

- (9) (a) If the first party to the contract is a man who has donated his sperm, the child shall be presumed to be his child. If he is married, the child shall be presumed to be the child of the sperm donor and his spouse. If the first party to the contract is an unmarried woman, the child shall be presumed to be her child.
 - (b) If the surrogate mother is married, the presumption established by the Artificial Insemination Act that a child born of A.I.D. will be the child of her husband will not be applicable.
 - (c) All children born of a surrogate parenthood arrangement will be legitimate.²⁰⁹
- (10) The mother shall have a limited option of refusal to relinquish the child in accordance with the terms of the contract. The contract may provide that such an option shall be limited only to the situation where the mother makes a personal choice to keep the child as her own. It cannot be exercised to enable the mother to relinquish the child to a third party. The mother will have up until 30 days after the birth of the child [or the time specified by the state with regard to other mothers relinquishing children for adoption] before a relinquishment of parental rights will become final. If the mother chooses to exercise the personal choice provision of the contract, the contract may provide that she must return up to 90% of all payment received and that she must pay for the medical expenses of childbirth. Failure to do so may be a breach of contract, and subject the mother to specified damages.
- (11) Any attempt by the mother to use the personal option of non-relinquishment as a means to alter the agreed-upon compensa-

208. If the child is born with fetal alcohol syndrome or with a drug addiction and the contract has specified that the mother may not drink or take drugs during her pregnancy, then it is appropriate to require her to accept the burden of her actions by allowing the father to refuse to take custody. This provision is not intended to cover situations where a baby is born with a genetic defect, which is not a direct result of the mother's actions or allegations that the mother should have done more than the contract required to produce a healthy child.

The natural father may want to order the mother to undergo amniocentesis and have an abortion if the child is not healthy. This option would interfere with her right to procreate and would probably not be upheld. However, the contract might specify that if the mother refuses to undergo an abortion when it is known that the child will be impaired, she must take custody of the child.

209. These provisions are designed to eliminate two of the central concerns of surrogate parenthood contracts—the status of the child and the problems presented by the state statutes which state that a child born to a married woman who has obtained A.I.D. will be presumed to be the child of the woman and her husband, *see supra* note 25. In *Syrkowski v. Appleyard*, 362 N.W. 2d 211 (1985), the petitioner attempted to be declared the natural father of a child conceived with his sperm by a married woman. The Attorney General of Michigan claimed that because the woman's husband consented to the insemination, he must be declared the child's father, due to the statutory presumption. The Supreme Court of Michigan ultimately held that the Circuit Court had jurisdiction over the biological father's request under the Paternity Act.

tion for relinquishment will be considered a breach of the contract and may subject the mother to specified damages. Moreover, such an attempt to alter the contractual terms will be considered "bad faith" and will nullify her personal option of non-relinquishment. A court will be empowered to order her to relinquish the child in accordance with the terms of the contract. Any attempt to relinquish the child to a third party will be considered similar evidence of "bad faith" and may subject the mother to punitive damages and a court order terminating the mother's parental rights.

- (12) At the option of the parties, the contract may have terms regarding parental rights of the father should the mother choose not to relinquish the child. It must be understood that such terms are subject to a court's determination as to the best interest of the child.

This suggested legislation represents an attempt to reconcile the competing interests of all parties. It is not intended as a substitute for an actual contract, which may be tailored to fit the needs of the individual parties, but it does set certain limits. It recognizes the serious public policy and constitutional concerns that binding provisions regarding conception, pregnancy, and relinquishment would present by allowing options to the mother. However, by permitting these options, it contemplates that exercise of the options would not entirely void the contract, so that the mother would have to return the payment received.

The most important part of the proposed legislation, Section 10, allows the mother the personal option of choosing not to relinquish the child. The mother must be advised, however, that the father will still have a right to file a child custody suit to obtain custody. Any contract which attempts to provide in advance for a waiver of that right would probably be declared void because courts have consistently recognized that the best interest of the child is paramount to any contractual agreements between the child's parents.²¹⁰ Therefore, the compromise proposal does not resolve the difficult issues that will be presented when a surrogate mother decides not to relinquish her baby. It does, however, remove them from the realm of contract law.²¹¹

Many aspects of this proposal resemble proposals to allow the mother the right to void the contract, but Section 11 is intended to avoid a serious problem that an absolute right to void the contract would pres-

210. Goldstein, *supra* note 77.

211. At least one commentator has suggested that the mother's decision to enter into a surrogate contract should create a presumption in the father's favor in a custody action. Coleman, *supra* note 5.

ent. If the woman's sole motive for entering into a surrogate contract is pecuniary, she may attempt to add to her gains by playing upon the father's emotions once the child is born by a threat not to relinquish unless she is paid a higher sum — a tactic currently employed by "black market" baby operators.²¹² Alternatively, she may opt for a "highest bidder" situation in which a third party may compete with the father for the child. Such practices would constitute "baby-selling" in its most heinous form and cannot be allowed. Section 11 of the proposed legislation is an attempt to remove this possibility.

This compromise, like all compromises, can be characterized as either the "best of both worlds" or the "worst of both worlds." On one hand, it legalizes an arrangement which often proceeds to the satisfaction of parties and which satisfies the deep-seated emotional need of the infertile couple, while avoiding the unconscionable results of forcing a woman to conceive, carry, or give up a child against her will. On the other hand, the "escape clauses" necessarily create a great deal of uncertainty about the arrangements that will undoubtedly create a great deal of emotional stress for all parties concerned. Knowing she has the option of keeping her child may make the mother's decision more difficult. Moreover, as has been discussed, although a mother's decision to keep the child cannot be considered a breach of contract, it can be overridden in a custody hearing, which would result in additional pain for everyone concerned. The prospective adoptive parents must endure nine months of uncertainty as to whether they will eventually receive custody of the child they will immediately begin to think of as theirs.

The costs of the compromise are high, but ultimately they outweigh the alternative of banning surrogate motherhood arrangements entirely. Parents arranging independent adoptions must also endure periods of uncertainty, but this has never been considered a major argument for prohibition of independent adoptions. The surrogate parents at least have the reassurance of knowing that there is a strong financial incentive for the mother to relinquish the child, while the independently adopting parents are forbidden to offer this incentive. On the other hand, surrogate parents lose a child related to the father by blood and adoptive parents do not suffer that type of loss. Moreover, if an independent adoptive arrangement falls through, the prospective parents may try again. Prospective surrogate parents, even though theoretically protected from losing large sums of money, may not be able to recover from the mother and

212. *See supra* notes 158-60 and accompanying text.

may financially be prevented from a second chance. Ultimately, however, this is the risk they choose to take and it is no greater than the risks presented by the current unsettled status of surrogate parenting contracts.

IV. CONCLUSION

O wind of Tizoula, O wind of Amsoud!
 Blow over the plains and over the sea,
 Carry, oh, carry my thoughts
 To him who is so far, so far,
 And who has left me without a little child.
 O wind! remind him I have no child.

Berber Woman's Song²¹³

The cry of the Berber woman expresses the anguish felt by childless persons. Modern technology can relieve their pain and satisfy the deep human need for parenthood. This solution must not be limited by an ill-considered Attorney General's opinion which is based on legislation passed before the existence of artificial insemination or surrogate motherhood arrangements.

A ban on A.I.D. for single women would likely be struck as unconstitutional.²¹⁴ The legislature can avoid this result by expressly permitting this procedure. Although the result of the ban on surrogate parenting arrangements is more open to question, there are good reasons why the state should choose to permit such arrangements within the limits of the proposed legislation.²¹⁵

The issues discussed in this article are difficult, but they represent fundamental human problems that will not go away. The legislature must act promptly to resolve them.

213. Greer, *supra* note 1, at 59 (quoting E. FERNEA & B. BERZIGAN, MIDDLE EASTERN MUSLIM WOMEN SPEAK (1977)). In her chapter on "The Curse of Sterility," Dr. Greer discusses the fact that, "[w]estern women may spend a fortune and masochistically undergo repeated surgical procedures in an attempt to bear a child." This chapter is primarily devoted to the plight of childless women in Asia and Africa. In their cultures, infertility is a disgrace which may result in their husband's taking another wife. It is often associated with sin, and lack of children is seen as God's punishment. Although the Western attitude toward sterility is not as harsh, many infertile women feel that they have done something wrong or are being punished in some way by their infertility. *Id.* at 60.

214. See *supra* notes 48-111 and accompanying text.

215. See *supra* notes 201-212 and accompanying text.